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Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, AS CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, PETITIONER,

vs.

EDMUND BLAIR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED MARCH 13, 1952
CERTIORARI GRANTED MARCH 24, 1952

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Circuit Court for the Tenth Judicial Circuit of the State of Alabama		
Certificate of appeal	b	1
Organization of Court	b	1
Summons	1	2
Petition for mandamus	2	2
Exhibit "A"—Resolution adopted by the State Democratic Executive Committee of Alabama on January 26, 1952	2	3
Order to show cause	5	7
Motion for continuance	11	13
Motion to quash summons	12	14
Motion to quash order to show cause or alternate writ of mandamus	15	17
Amendment No. 1 to petition	15	18
Demurrer to petition as last amended	16	19
Answer of Ben F. Ray	19	21
Exhibit 1—Rules of the Democratic Party of Alabama	30	35
	36	41

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		Page
Record from the Circuit Court for the Tenth Judicial Circuit of the State of Alabama—Continued		
Amendment No. 2 to petition	42	47
Minute entry	43	48
Peremptory writ of mandamus and notice	45	51
Security for costs	46	53
Citation of appeal to Supreme Court of Alabama	47	54
Transcript of evidence	49	55
Appearances	49	55
Stipulation of fact	49	55
Testimony of Edmund Blair	51	57
Petitioner's Exhibit No. 1—Letter dated January 30, 1952, from Edmund Blair to Secretary of State	53	59
Petitioner's Exhibit No. 2—Letter from Mrs. Agnes Baggett to Edmund Blair	53	59
Testimony of Ben F. Ray	91	96
Petitioner's Exhibit No. 3—Letter dated January 29, 1952 from Horace C. Wilkinson to Ben F. Ray	92	97
Petitioner's Exhibit No. 4—Letter dated January 30, 1952 from Horace C. Wilkinson to Ben F. Ray	93	98
Petitioner's Exhibit No. 5—Letter dated January 30, 1952 from Ben F. Ray to Horace C. Wilkinson	94	99
Testimony of Edmund Blair (recalled)	127	133
Colloquy	131	136
Opinion, Windham, J.	139	142
Reporter's certificate (omitted in printing)	151	
Clerk's certificate	153	152
Proceedings in the Supreme Court of Alabama	155	153
Appellant's assignments of error	155	153
Argument and submission	160	158
Opinion, Livingston, C.J.	161	159
Dissenting opinion, Brown and Simpson, JJ.	168	165
Judgment	181	175
Application for stay	182	176
Order denying stay	184	177
Clerk's certificate (omitted in printing)	185	
Order granting certiorari	186	177

[fol. a-b]

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

Certificate of Appeal

The State of Alabama,
Jefferson County:

I, Julian Swift, Clerk of the Circuit Court in and for said County and State, do hereby certify that in the cause of Ben F. Ray as Chairman of State Democratic Executive Committee of Alabama (Respondent), Appellant, vs. Edmund Blair (Petitioner), Appellee, which was tried and determined in this Court on the 6th day of February, 1952, wherein judgment was rendered in favor of the Petitioner, the Respondent prayed for and obtained an appeal to the Supreme Court of Alabama, to be holden in and for said State.

I futher certify that on the 7th day of February, 1952, the Respondent filed security for costs of appeal to the Supreme Court of Alabama, and that National Surety Corporation is Surety on said security for costs for all costs of said appeal.

I further certify that on the 8th day of February, 1952, notice of appeal was duly served on Wilkinson and Skinner, Attorneys of Record for said Appellee.

Witness my hand and seal of office the 15th day of February, 1952.

(S.) Julian Swift, Clerk of the Tenth Judicial Circuit of Alabama.

[fol. 1] CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

ORGANIZATON OF COURT

At a regular term of the Circuit Court of the Tenth Judicial Circuit of Alabama, at which the officers authorized by law to hold or serve such Court were serving, the following proceedings were had in the cause styled:

EDMUND BLAIR, Petitioner,

vs.

BEN F. RAY as Chairman, State Democratic Executive Committee, Respondent

---

[fol. 2] CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

SUMMONS—January 30, 1952

To Any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama to appear before the Circuit Court, to be held for said County, at the place of holding the same on the 2nd day of February, 1952, then and there to answer the annexed petition for mandamus and the order of the Court thereon.

Witness my hand, this 30th day of January, 1952.

Julian Swift, Clerk, Circuit Court.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

No. —

EX PARTE EDMUND BLAIR, Petitioner

PETITION FOR MANDAMUS

To the Honorable Judges of the Circuit Court of Jefferson County, Alabama:

Your petitioner, Edmund Blair, respectfully shows unto the Court the following statement of facts, to-wit:

(1) Edmund Blair is a resident of St. Clair County, Alabama, and is over twenty-one years of age. He is a registered qualified voter in St. Clair County, Alabama, and a taxpayer in said county in said state.

He was the nominee of the Democratic Party in Alabama for presidential and vice-presidential elector in 1948. He ran on the platform in which he pledged the people that he would not cast an electoral vote for Harry S. Truman if he was nominated and elected and placed in a position where he might be able to do so. He was nominated by the Democratic Party in the Democratic Primary in Alabama in 1948, and was elected in the November election in 1948, and he did not cast an electoral vote for Harry S. Truman in November, 1948.

(2) On, to-wit, the 26th day of January, 1952, the State Democratic Executive Committee of Alabama adopted a Resolution, a true copy of which is hereto attached and ma-ked Exhibit "A", and made a part hereof as if fully set-out herein.

(3) Petitioner desires to qualify as a candidate for nomination for presidential and vice-presidential elector in the 1952 Democratic Primary in Alabama. On the 29th day of January, 1952, petitioner offered to qualify as such a candidate with the Honorable Ben F. Ray, as Chairman [fol. 3] of the State Democratic Executive Committee of Alabama, and as the executive and administrative officer of said Committee and on said date tendered to the said Ben F. Ray the sum of ten dollars ($10.00) in lawful money of the United States of America in payment of the entrance

or qualifying assessment as provided for in the aforesaid Resolution. He also presented and filed with the said Ben F. Ray, as such Chairman an affidavit in words and figures as follows:

"STATE OF ALABAMA,
Jefferson County:

I, hereby declare myself to be a candidate for the Democratic nomination in the primary elections to be held on Tuesday, the 6th day of May, 1952, and on Tuesday, the 3rd day of June, 1952, for the office of Presidential and Vice-Presidential elector. I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for any one other than the nominees of the Democratic Party in Alabama, or any ticket other than the Democratic ticket in Alabama, or openly and publicly in said general election oppose the election of the nominees of the Democratic Party in Alabama, or any of them. I further agree to abide by the result of the primary elections in which I am a candidate and I do pledge myself to aid and support all the nominees in said Primary Elections, but I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program. I further certify that I am a qualified elector of the State of Alabama and possess the qualifications fixed by law for the office for which I am a candidate, and if a candidate for the Democratic nomination for Judge of a Court of record, I do further certify that at the time of filing this declaration of candidacy, I am not under disbarment or suspension.

(S.) Edmund Blair.

Sworn to and subscribed before me on this the 29th day of January, 1952. (S.) Eloise W. Bennett, Notary Public, Jefferson County, Alabama."

(4) Petitioner avers that the said Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama accepted the foregoing declaration of candidacy and the sum of ten dollars ($10.00) tendered by petitioner in pay-

ment of the assessment against candidates for nomination for presidential and vice-presidential elector and stated that [fol. 4] he wanted to think the matter over before deciding what action he would take on the said declaration of candidacy. On Wednesday, January 30, 1952, petitioner caused a letter to be delivered to the Honorable Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, reading as follows:

"January 30, 1952.

Hon. Ben F. Ray, Chairman, State Democratic Committee of Alabama, Birmingham, Alabama.

DEAR MR. RAY:

On yesterday, Mr. Edmund Blair filed with you his declaration of candidacy and also paid you ten dollars ($10.00) in United States currency to pay his assessment and qualifying fee. At that time you were requested to indicate your action on this declaration of candidacy, and you stated that you wanted some time to think it over.

In this morning's paper you are quoted as saying: "I am going to take my time on deciding whether Blair's application should be accepted." We construe this as an indication on your part that you will not perform your duty when the time arrives and there will not be sufficient time between your refusal and the primary to obtain relief in court if we wait until that time.

You are accordingly notified that we are preparing a Petition for Mandamus which will be filed during the day unless you advise us that you will agree to certify Mr. Blair's candidacy to the Secretary of State within the time required by law.

Yours very truly, Horace C. Wilkinson, Attorney for Edmund Blair."

HCW:K

(5) Petitioner avers that the said Ben F. Ray has not agreed to certify petitioner's candidacy to the Secretary of State.

(6) Petitioner is informed and believes, and on such information and belief, charges and states that the said Ben

F. Ray as such Chairman will not certify petitioner's candidacy for such nomination for presidential and vice-presidential elector as required by Title 17, Section 344 of the Code of Alabama, and petitioner is informed and believes and charges that the said Ben F. Ray as such chairman is delaying the decision on the disposition he will make of petitioner's declaration of candidacy and the ten dollars ($10.00) paid him by petitioner until the time when there will not be sufficient time between his refusal and the primary for petitioner to obtain relief in the courts if the said [fol. 5] Ben F. Ray does not certify his candidacy to the Secretary of State as required by Title 17, Section 344 of the Code of Alabama.

(7) Petitioner has this day mailed to the Secretary of State by registered mail the statement required by Title 17, Section 274 of the Code of Alabama.

Premises considered, petitioner prays that Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama be required to appear before this court on such day and date as the court may fix, then and there to show cause, if any he has, why he should not certify to the Secretary of State not less than forty days prior to the date of holding the Democratic Primary on May 6, 1952, the name of Edmund Blair as a candidate for nomination for presidential and vice presidential elector in said primary election. Petitioner prays that on a final hearing the court will issue a writ of mandamus to the said Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, commanding him to certify to the Secretary of State not less than forty days prior to the date of holding the primary above referred to the name of Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in said primary election and petitioner prays for such other, further, general, special and appropriate relief to which he may be entitled to and for which he is in duty bound will ever pray.

Horace C. Wilkinson, Attorney for Petitioner.

Duly sworn to by Edmund R. Blair. Jurat omitted in printing.

Exhibit "A" to Petition

The Following Resolution Was Adopted by the State Democratic Executive Committee of Alabama at Its Meeting Held in Montgomery, Alabama, on Saturday, January 26th, 1952:

Be It Resolved by the State Democratic Executive Committee of Alabama as Follows:

1. That under the authority, and subject to the terms and [fol. 6] provisions of, the Primary Election Law of Alabama as contained in Sections 336 to 424, both inclusive, of Title 17 of the Code of Alabama of 1940, and the amendments thereto, a Democratic Primary Election is hereby ordered to be held throughout the State of Alabama on Tuesday, May 6th, 1952, and, if necessary, as provided by said law, a second Democratic Primary Election is hereby ordered to be held throughout the State of Alabama on Tuesday, June 3rd, 1952.

2. That said Primary Election shall be held and conducted in all respects in accordance with the Primary Election Law of Alabama as hereinabove referred to.

3. (A) That in said Primary Elections there shall be nominated candidates for all Federal, State, District, Circuit, County and Precinct offices to be filled in the General Election to be held in November, 1952; and there shall be nominated in said Primary Elections eleven Electors for President and Vice-President of the United States from and by the State at Large and eleven Alternate Electors from and by the State at Large.

(B) That there shall be elected in said Primaries a Democratic National Committeeman and a Democratic National Committee woman from the State of Alabama; and in said Primary Elections there shall also be elected twenty-six Delegates and twenty-six Alternate Delegates to the Democratic National Convention which shall be held in 1952, eight of said Delegates and eight of said Alternate Delegates to be elected from and by the State at Large, and two of said Delega-es and two of said Alternate Delegates to be elected from and by each of the nine Congressional Districts in this State. Of the eight Alternate Delegates elected

from the State at Large the one receiving the highest number of votes in said Primary Election shall be designated as Alternate Delegate from the State at Large No. 1, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 2, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 3, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 4, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 5, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 6, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 7, [fol. 7] and the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 8, and in the same order such Alternates shall fill vacancies as the same may occur in the delegation from the State at Large. Also, as to the two Alternates elected from each Congressional District as herein provided, the one receiving the highest number of votes in said Primary Election shall be designated District Alternate Delegate No. 1 from said District and the one receiving the next highest vote therein shall be designated as District Alternate Delegate No. 2 from said District, and shall in the same order fill vacancies as the same may occur in the delegation from the respective Districts. Should there be any vacancy from any cause in the Alabama Delegation in the Democratic National Convention of 1952, and an Alternate Delegate is not present to fill such vacancy, then the remaining members of the Alabama Delegation to said Democratic National Convention shall by majority vote fill any and all such vacancies on the said Alabama Delegation.

4. That the following persons shall be entitled to vote in said Primary Elections, and none others, namely: Qualified electors in this State who believe in the principles of the Democratic Party, and who agree and bind themselves by participating in said Primary, to abide by the result of said Primary Elections and to aid and support the nominees of the Democratic Party therein and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, and that there

shall be printed in plainly visible type at the bottom of each ballot prepared for said Primary Elections, and on the face of each voting machine used therein the following, to-wit:

"By casting this ballot I do pledge myself to abide by the result of this Primary Election and to aid and support all the nominees there in the ensuing General Elections. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."

5. That the following persons, and none others, shall be eligible to be candidates for nomination or election in said Primary Elections, namely: Qualified electors who possess the qualifications fixed by law for the respective offices for which they are candidates for nomination or election; provided, however, that no person shall become a candidate for any Federal, State, District, Circuit, County, Precinct or Party Office, or have his or her name printed upon the [fol. 8] Democratic ballot in said Primary Elections, if such person voted a Republican ticket or any independent ticket, or the ticket of any party or group other than the Democratic Party, or for anyone other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket in the General Election held in November, 1950, or openly and publicly opposed the election of the nominees of the Demoractic Party, or any of them, in the General Election held in November, 1950; and provided further that each such proposed candidate shall have filed with the Chairman of the State or County Democratic Executive Committee as provided in Paragraph 6 of this Resolution a declaration of candidacy signed and sworn to by such proposed candidate containing a pledge to aid and support all of the Democratic nominees in said elections and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, and provided further that no person shall become a candidate for the Democratic nomination for Judge of a Court of Record who is under disbarment or suspension at the time he seeks to qualify for such office. Each such proposed candidate shall also be required to pay, as hereinafter provided, the assessment, or entrance fee, fixed, or levied,

by this Committee, or fixed or levied by his County Democratic Executive Committee, if he be a candidate for nomination for a County Office, On or before the first day of March, 1952.

6. That candidates for nomination or for election for all of said offices shall, On or before March 1, 1952, file with the Chairman of the State Democratic Executive Committee in all offices except County offices, and for County offices, with the Chairman of the respective County Democratic Executive Committees, a declaration of candidacy as follows:

"I hereby declare myself to be a candidate for the Democratic nomination (or election) in the primary elections to be held on Tuesday, the 6th day of May, 1952, and on Tuesday, the 3rd day of June, 1952, for the office of ——, I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for any one other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket, or openly and publicly in said general election oppose the election of the nominees of the Democratic Party, or any of them, I further agree to abide by [fol. 9] the result of the primary elections in which I am a candidate and I do pledge myself to aid and support all the nominees in said Primary Elections, and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States. I further certify that I am a qualified elector of the State of Alabama and possess the qualifications fixed by law for the office for which I am a candidate, and if a candidate for the Democratic nomination for Judge of a Court of Record, I do further certify that at the time of filing this declaration of candidacy, I am not under disbarment of suspension.

Sworn to and subscribed before me on this the—day of ——, 1952. —— ——, Notary Public, —— County, Alabama."

7. That in accordance with Section 346 of Title 17 of the Code of Alabama, of 1940, hereinabove referred to, this Committee, desiring to enter the Primary Elections ordered

to be held under the Provisions of said Primary Law, shall give public notice thereof by filing, in accordance with said Section of our Code, a copy of this Resolution with the Secretary of State of Alabama, and the Chairman of this Committee is authorized and directed to prepare, execute and file said copy.

8. That the following entrance or qualifying assessment against each candidate for nomination, or election, in such Primary Elections, except as to County offices, be, and the same hereby are, fixed, or levied, by this Committee.

(1) Against each candidate for nomination for any remunerative office, other than a County office, two per cent of the emolument of such office for one year, from every lawful source (not including allowance to Circuit Judges and Circuit Solicitors for expenses and allowances to Congressmen and United States Senators for expenses), except that in the case of candidates for Circuit Judge for the unexpired term of their predecessor, the entrance or qualifying assessment shall be $35.00;

(2) Against each candidate for Elector for President and Vice-President of the United States, and against each Alternate candidate for Elector, $10.00;

(3) Against each candidate for Democratic National Committeeman, $50.00;

(4) Against each candidate for Democratic National [fol. 10] Committeewoman, $50.00;

(5) Against each candidate for Delegate to the Democratic National Convention from the State at Large, $50.00, and against each candidate for Alternate Delegate to the Democratic National Convention from the State at Large, $25.00;

(6) Against each candidate for Delegate to the Democratic National Convention from a Congressional District, $10.00, and against each candidate for Alternate Delegate to the Democratic National Convention from a Congressional District, $5.00.

9. That no candidate for nomination for any office or for election to any party office other than a County office, who fails to pay the assessment required to be paid by him On or before March 1st, 1952, to and with the Chairman

of the State Democratic Executive Committee, shall have his name printed on the tick-, nor shall votes for such candidate so failing to qualify be counted.

10. That, within the limits provided by law, the authority of this Committee to fix entrance or qualifying fees or assessments of candidates for Democratic nomination for County office, is hereby vested in the several Democratic County Executive Committees of this State, insofar as the 1952 Democratic Primary Elections are concerned.

11. That no candidates for nomination for a County office who fails to pay the assessment required to be paid by him On or before March 1st, 1952, or who fails to file his affidavit in the form herein prescribed On or before the 1st day of March, 1952, to and with the Chairman of the County Democratic Executive Committee, shall have his name printed on the ticket, nor shall votes for such candidate so failing to qualify be counted.

12. That the Chairman of this Committee be, and he hereby is authorized, empowered, and directed, to appoint a Sub-Committee of five, consisting of the Chairman of this Committee, who will be the Chairman of the Sub-Committee, and four members of this Committee, and such Sub-Committee shall have all the powers of this Committee to supervise the holding of the Primary Elections herein ordered, including the canvassing and tabulating of the vote and the declaration of result and the certification of those nominated, and/or elected, and the said Sub-Committee shall perform all the duties required by law of this Committee in said Primary Elections, except the duties reposed by law on the Chairman.

13. That no County Democratic Executive Committee of [fol. 11] any County of the State shall pass any resolution or take any action in the premises in conflict herewith.

14. That a copy of this resolution be sent by the Chairman of this Committee to the Chairman of each County Democratic Executive Committee of the State for their guidance and compliance.

15. That if, in the opinion of the Chairman of this Committee, it becomes necessary or advisable for any further action to be taken in connection with such Primaries or the details pertaining thereto, the Chairman of this Committee

is hereby fully authorized and empowered to act for and on behalf of the Committee.

16. If any sentence, clause, term, provision, or part of this resolution should be held invalid or ineffective by any Court or officer such holding shall not invalidate or affect the remainder of this resolution.

STATE OF ALABAMA,
Jefferson County:

I, Ben F. Ray, Chairman of the State Democratic Executive Committee of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the resolution adopted by the State Democratic Executive Committee of Alabama, at its meeting held in Montgomery, Alabama, on January 26th, 1952, and I do hereby file this certified copy of the said resolution with Mrs. Agnes Baggett, Secretary of State of Alabama, in all respects as provided by Section 346 of Title 17 of the Code of Alabama of 1940.

Given under my hand the seal of the said State Democratic Executive Committee of Alabama, at Birmingham, Alabama, on this the 26th day of January, 1952.

Ben F. Ray, Chairman of the State Democratic Executive Committee of Alabama.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER TO SHOW CAUSE AND SHERIFF'S RETURN—January 30, 1952

On consideration of the foregoing verified petition, it is Ordered that Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama appear before this Court on the 2nd day of February, 1952, at nine-thirty o'clock A. M., then and there to show cause, if any he has, why a writ of mandamus should not issue to him, commanding him to certify to the Secretary of the State of Alabama not less than forty days prior to the holding of the Democratic Primary on May 6, 1952, the name of Edmund Blair as a candidate for nomination for Presidential and Vice-Presidential elector. It is further Ordered that a copy of the

foregoing petition and a copy of this order be forthwith [fol. 12] served on Ben F. Ray, instanter, and due return made thereof according to law.

This the 30th day of January, 1952.

J. Russell McElroy, Circuit Judge.

Filed in office Jan. 30, 1952.

Sheriff's Return

Executed this the 30 day of January, 1952 by leaving a copy of the within with Ben F. Ray, as Chmn. of State Dem. Exec. Comm. of Ala.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, by Wilton H. Hogan, D. S.

In Circuit Court of Jefferson County

Motion for Continuance—Filed February 2, 1952

To the Honorable Judges of the Above-styled Court:

Now comes Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, and appearing specially for the purpose of moving this court to grant a continuance of the hearing in this cause, and for no other purpose whatsoever, and without submitting himself, as such Chairman of the State Democratic Executive Committee of Alabama, to the jurisdiction of this court, moves the court to enter an order continuing the hearing of this case from February 2, 1952, to such subsequent date as the court shall deem proper and reasonable, and as basis for said motion sets down and assigns the following separate and several facts:

1. That said petition was filed in said court and presented to the Honorable J. Russell McElroy, Presiding Judge of said court, on January 30, 1952, the said petition being ex parte in character and name, naming no person as an adversary party, and praying for process to issue against no adversary party, but praying that this movant, as Chairman of the State Democratic Executive Committee of Ala-

bama, be required to appear before this court, on such day and date as the court may fix, and show cause why he should not certify to the Secretary of State the name of petitioner as a candidate for nomination for presidential and vice-presidential elector in the 1952 Democratic Primary election, and further praying that on a final hearing the court issue a writ of mandamus to this movant, as such Chairman, commanding him to make such certification.

2. That the said Presiding Judge, the Honorable J. Rus-
[fol. 13] sell McElroy, upon said petition being presented to him on said date, forthwith entered an order that this movant, as such Chairman, appear before this court on February 2, 1952, at 9:30 a. m., and then and there show cause, if any, why a writ of mandamus should not issue to him, commanding him to certify petitioner's name to the Secretary of State of Alabama as prayed for in said petition; and that said order further provided that a copy of said petition and of said order be served instanter on this movant and return made according to law.

3. Movant avers that a copy of said petition and order was served upon this movant on January 30, 1952, at about 3 o'clock in the afternoon, such service being effected shortly after said order was entered.

4. Movant further avers that petitioner's attorney of record in this cause, Hon. Horace C. Wilkinson, has a pending proceeding for a declaratory judgment against this movant, wherein he prayed that this court enter a declaratory judgment in favor of said Wilkinson, that said Wilkinson be entitled to substantially the same relief prayed for by petitioner herein; and that, at the time of service of said petition and order in this cause upon movant, the attorneys of record for movant in said Wilkinson case, Messrs. James J. Mayfield, of Tuscaloosa, Alabama, and Harold M. Cook, of Birmingham, Alabama, were both inaccessible to movant, the said Mayfield being engaged in his duty as a practicing attorney at Tuscaloosa, Alabama, and said Cook being in Montgomery, Alabama, for the purpose of filing briefs in the Supreme Court in said Wilkinson case, and that said Cook did not get an opportunity to examine said petition and order until about 24 hours before this case was set for hearing, and said Mayfield received

a copy, by special messenger, at 4 p. m. on the afternoon of January 31, 1952.

5. That this movant and his said attorneys, whom he desires to represent him in this proceeding, had no opportunity to confer together and begin preparation for said hearing until less than 24 hours before the date and hour set for such hearing, and that it has been physically and manually impossible for movant and his said attorneys to properly brief the questions of law involved and manually prepare necessary and responsive pleadings to properly raise the questions of law and fact presented by said petition and the order of the court.

6. Movant further says that, subsequent to the filing of [fol. 14] said petition and the rendition of said order, this movant has been served with a subpoena to appear as a witness, at the date and hour said case is set for hearing, ostensibly for the purpose of requiring petitioner to give testimony as to facts in support of the averments of said petition. Movant avers that it has been impossible for him and said attorneys to summon such witnesses as may be necessary to controvert the allegations of the petition and assemble such documentary evidence as may be necessary or required, in view of the fact that the issue in this cause has not been joined and framed by the pleadings in this cause and cannot be joined until movant and his attorneys have sufficient time to draft and present their pleadings herein.

7. Movant avers that the peremptory order of the court to appear and show cause why writ of mandamus should not issue as prayed for, without allowing the movant sufficient opportunity to prepare a defense thereto, brief the questions of law involved, prepare responsive pleadings, and be otherwise accorded the rights of an adversary party, and summon such witnesses as may be necessary to prove or disprove issues subsequently formed by the pleadings, is a denial to your movant of due process of law as guaranteed by the fourteenth amendment of the Constitution of the United States.

8. Movant avers and shows unto the court that this motion is not filed for the purpose of delay, but only for the

purpose of allowing the movant sufficient time to properly prepare his defense to the intricate questions of law involved in said petition. Movant further states that he has a meritorious defense to said petition and that he will, and can, present the same to the court, if given the opportunity to do so.

Ben F. Ray, Movant.

Duly sworn to by Ben F. Ray. Jurat omitted in printing.

[fol. 15] In Circuit Court of Jefferson County

Motion to Quash Summons—Filed February 2, 1952

Comes Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, and appearing specially for the purpose of this motion, and for no other purpose whatsoever, and without submitting to the jurisdiction of the court, moves the court to quash the summons heretofore issued in this cause, and, as grounds for said motion, sets down and assigns the following, to-wit:

1. That said summons is not in the form prescribed by Title 7, Section 184, Code of Alabama, 1940.

2. That said summons issued by the clerk of this court, on the 30th day of January, 1952, orders and requires movant to appear on the 2d day of February, 1952.

3. That said summons orders and requires the movant to appear at an illegal time.

4. That said summons, if complied with, denies movant due process of law as guaranteed by the Constitution of Alabama and of the Constitution of the United States.

5. That said summons was issued to your movant who is not a party, adversary or otherwise, to this action.

6. That petitioner has not prayed for process against your movant and said summons was gratuitously issued by the clerk of this court.

7. Said summons was illegally issued by said clerk in that it purports to require this movant to answer the petition for mandamus therein referred to when said petition

does not make this movant a party to said proceeding nor pray for process to issue against this movant.

Respectfully submitted, Harold M. Cook, James J. Mayfield, Attorneys for Movant.

Filed in Open Court this 2 day of Feb., 1952.

In Circuit Court of Jefferson County

Motion to Quash Order to Show Cause or Alternate Writ of Mandamus—Filed February 2, 1952

Comes Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, by and through his attorneys, and appearing specially for the purpose of this motion, and for no other purpose whatsoever, and without submitting himself to the jurisdiction of this court, moves [fol. 16] to quash the court's order of the 30th day of January, 1952, in this cause, whether said order be designated or determined to be a rule nisi or an alternate writ of mandamus, and, as grounds for said motion, sets down and assigns the following separately and severally:

1. Said order purports to require this movant to appear as an adversary party in said proceeding, without this movant being made an adversary party to the petition filed herein and without said petition praying for process to issue aganst this movant.

2. Said order, requiring this movant to appear and show cause within two legal days after said petition and order were served upon him, and without movant being made an adversary party to said proceedings, by the petition, and without prayer for process issuing against him as such adversary party, denies to this movant due process of law as provided by the fourteenth amendment of the Constitution of the United States.

3. That the time fixed by said order for this movant to appear and show cause is arbitrary and unreasonable and constitutes an abuse of judicial discretion.

4. That said order is based upon a petition which would require movant to do an unlawful act.

5. That the petition upon which such order is based does not show a prima facie right to the relief prayed for.

6. Said order is based upon a petition which affirmatively shows that it is beyond the power and duty of this movant to perform the act which petitioner seeks in this proceeding to have the court compel this movant to perform.

7. That said order attempts to control movant's discretion as Chairman of the State Democratic Executive Committee of Alabama.

Respectfully submitted, Harold M. Cook, James J. Mayfield, Attorneys for Movant.

Filed in open court this 3 day of Feb., 1952.

IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDMENT #1 TO PETITION—Filed February 2, 1952

By leave of the Court first had and obtained, petitioner amends his petition heretofore filed in this cause by adding [fol. 17] the following paragraphs immediately after paragraph (6) and immediately before paragraph (7), viz:

(6-a) Petitioner avers that in the event he is mistaken in the allegations contained in paragraph (6) of his petition, he avers in the alternative that Ben F. Ray as such Chairman has unequivocally manifested a settled purpose and determination not to certify, and to delay his decision about certifying, to the Secretary of State of Alabama, petitioner's candidacy for nomination for presidential and vice-presidential elector in the 1952 Democratic Primary until such time as that it would probably be too late for petitioner to apply to the court for relief or too late for the courts to award petitioner an efficient remedy after the decision of the said Ben F. Ray if said Chairman was not to certify petitioner's said candidacy.

(6-b) Petitioner further avers that the failure or refusal of the said Ben F. Ray as said Chairman to reach and announce a determination with respect to certifying petitioner's said candidacy to the Secretary of State of Alabama is a serious violation of petitioner's right to now know that

his candidacy for said nomination will be certified to the Secretary of State of Alabama not less than forty days prior to said Primary on May 6, 1952. Petitioner is being embarrassed by the fact that he cannot assure his supporters or the voters to whom he appeals to for support that his candidacy will be certified and that his name will appear on the primary ballot as a candidate for nomination for presidential and vice-presidential elector, and petitioner is required to devote the time he might otherwise devote to soliciting support for his said candidacy to attending court in an effort to have it established that his name will appear on the official ballot in said primary as a candidate for nomination for presidential and vice-presidential elector.

(6-c) Petitioner avers that the said Ben F. Ray has made public speeches in which he undertook to defend the action of the State Democratic Executive Committee of Alabama complained of herein; that he has protested in this court and is now insisting in the Supreme Court of Alabama in another proceeding that the said Committee was within its legal rights in adopting that part of the Resolution herein complained of purporting to require candidates and voters to pledge themselves to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States.

[fol. 18] Said Ben F. Ray is a resident of Jefferson County, Alabama over 21 years of age.

(6-d) Petitioner avers that after the said Ben F. Ray, as Chairman of said Committee, received the letter dated January 30, 1952, set out in paragraph (4) of this petition, the said Ben F. Ray, as said Chairman, replied to said letter on January 30, 1952, which reply was in words and figures as follows:

"January 30, 1952

Hon. Horace C. Wilkinson
Attorney at Law
Farley Building
Birmingham, Alabama

Dear Mr. Wilkinson: Re: Edmund Blair

Shortly after the declaration of Mr. Edmund Blair was filed with me Tuesday afternoon, a reporter with the Bir-

mingham Post-Herald called me for the purpose of verifying whether or not the declaration had been filed and expressed a desire to know what I expected to do with said declaration. I assumed that he acted on advance information and hence my reply quoted in the morning paper.

I am doing my best to serve the voters throughout the state and expect to pass on all matters presented to me to the best of my ability and within the time required by law.

Yours very truly, (S.) Ben F. Ray, Chairman.

BFR:re"

Horace C. Wilkinson, Attorney for Petitioner.

STATE OF ALABAMA,
Jefferson County.

Before me the undersigned authority in and for said county in said state, personally appeared Edmund Blair, who being by me duly sworn, deposes and says that he is informed and believes and on such information and belief states that the facts set out in the foregoing amendment to his petition are true and correct.

Edmund Blair.

Sworn to and subscribed before me on this the 2 day of February, 1952.

Thomas P. Meador, Notary Public.

Filed in open court this 2 day of Feb., 1952.

[fol. 19] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER TO PETITION AS LAST AMENDED—Filed February 2, 1952

Now comes Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, and, without waiving any motion or plea heretofore filed in this cause, demurs to the petitioner's petition as amended (hereinafter referred to as the petition) filed herein and the order of the court issued thereon, separately and severally, and to each and every section, paragraph, and aspect thereof, separately

and severally, and as grounds of such demurrer sets down and assigns the following, separately and severally:

1. It appears from the petition that the petitioner submitted a qualifying oath or pledge which was on its face substantially different from the qualifying oath or pledge adopted by the State Democratic Executive Committee of Alabama, and it does not appear that the respondent chairman of said committee had authority to accept as valid and legal such qualifying oath or pledge submitted by petitioner.

2. It appears from the petition that petitioner's remedy, if he does not desire to comply with the resolution of the State Democratic Executive Committee, is to apply to said committee *to apply to said committee* to change said resolution to suit petitioner's desires, it not appearing that said chairman has authority to change or modify the resolution of the committee or to accept a qualifying oath materially or substantially different from that called for by said committee resolution.

3. It appears from the petition that the respondent chairman, in accepting or rejecting applications to qualify as candidates in the 1952 Democratic primary, including the sufficiency of the oath or pledge submitted by applicants to become such candidates, acts in the exercise of a judicial or quasi-judicial discretion, and that mandamus will not issue to review the exercise of such discretion.

4. The petition shows on its face that petitioner has not complied with the requirements of the State Democratic Executive Committee which are prerequisite to qualifying to become a candidate in the 1952 Democratic primary in Alabama.

5. The petition shows on its face that petitioner is asking a writ of mandamus to compel respondent to do an illegal act.

6. The petition shows that petitioner seeks to have this court compel respondent to accept petitioner's application to qualify as a candidate for presidential elector in violation of the qualifications prescribed by the State Democratic Executive Committee.

[fol. 20] 7. It does not appear from the petition that the qualifications set up by the State Democratic Executive

Committee for candidates for presidential elector are in violation of any law or statute of the State of Alabama.

8. The petition lays no predicate for the relief prayed for.

9. It does not appear that the respondent chairman of said committee, in doing the alleged acts complained of, acted capriciously or arbitrarily.

10. The petition shows on its face that it is brought to compel respondent to perform an alleged public duty, and that the petition should have been brought for that reason in the name of the State of Alabama.

11. The averments of the petition do not show any prima facie right in petitioner to the relief prayed for in order to authorize the issuance of a rule nisi.

12. The petition shows that it seeks to compel respondent to take official action to accept the qualifying oath submitted by petitioner, and certify Petitioner as a candidate on the basis thereof, without averring any facts clearly showing respondent's legal authority to take the official action requested by petitioner.

13. The petitioner does not show or allege that the State Democratic Executive Committee acted illegally in adopting the resolution attached to and made a part of the petition, including the qualifying oath or pledge required of candidates for presidential and Vice-presidential elector as set out in said resolution.

14. It affirmatively appears from the petition that petitioner has refused to take the oath or pledge required by the State Democratic Executive Committee of candidates seeking to enter the 1952 Democratic primary in Alabama, and that petitioner does not possess the political qualifications prescribed by the governing body of the Democratic Party in Alabama.

15. It affirmatively appears that petitioner seeks in this proceeding to have this court compel said Ray to certify petitioner as a candidate in the 1952 Democratic primary in violation of Section 345, Title 17, Alabama Code of 1950, it affirmatively appearing from the petition that petitioner does not possess the political qualifications prescribed by the governing body of the Democratic party in Alabama.

16. It appears by the averments of said petition that peti-
[fol. 21] tioner does not possess the political qualifications

prescribed by the governing body of the Democratic Party in Alabama, as required by Section 345, Title 17, Alabama Code of 1940.

17. It affirmatively appears that petitioner is ineligible to have his name printed as a candidate upon any official ballot used in the 1952 Democratic Primary election in Alabama.

18. It affirmatively appears from the petition that the State Democratic Executive Committee of Alabama, in adopting the resolution attached to and made a part of said petition including the qualifying oath or pledge required of persons desiring to become candidates in the 1952 Democratic primary election in Alabama, was acting legally and in accordance with the provisions of Section 347, Title 17, Alabama Code of 1940, and that petitioner is unable or unwilling to meet or comply with the political qualifications set up in said resolution for candidates to enter said primary.

19. Said petition shows on its face that the declaration of candidacy filed by petitioner with the respondent chairman of said committee is not in the form prescribed by the governing body of the Democratic Party in Alabama, as required by Section 348, Title 17, Alabama Code of 1940.

20. Said petition shows on its face no legal right in the petitioner to have the respondent certify petitioner's name to the Secretary of the State of Alabama as a candidate for presidential elector in the 1952 Democratic primary elections as provided by Section 344, Title 17, Alabama Code of 1940.

21. It appears from said petition that petitioner seeks by this petition to have this court rewrite the oath or pledge required by the State Democratic Executive Committee of Alabama of candidates for presidential elector in the 1952 Democratic Primary elections.

22. It affirmatively appears from the petition that petitioner has neither complied nor offered to comply with the requirements of the State Democratic Executive Committee of Alabama, of persons seeking to become candidates in the 1952 Democratic primary elections in Alabama.

23. It affirmatively appears from the petition that petitioner has refused to take the oath required by the State Democratic Executive Committee of Alabama of candidates

for presidential elector in the 1952 Democratic primary elections in Alabama.

24. It does not appear from the averments of the petition [fol. 22] that the respondent chairman of the State Democratic Executive Committee of Alabama has legal authority to act as petitioner seeks to have this court compel him to act in this proceeding.

25. It does not appear from the petition that the petitioner has a "clear, specific legal right" to have respondent accept petitioner's declaration of candidacy and to certify petitioner's name to the Secretary of State of Alabama for inclusion upon the official ballot in the 1952 Democratic primary elections in Alabama.

26. The petition shows on its face that the granting of the writ of mandamus prayed for would tend to introduce confusion or disorder in the conduct or holding of the 1952 Democratic primary elections in Alabama.

27. The petition shows on its face that it illegally seeks relief at the hands of this court in that it seeks to subject the undersigned chairman to the jurisdiction of this court without making him a party to the proceeding.

28. For that it is not alleged that Petitioner is a member of the Democratic Party of Alabama.

29. For that it is not alleged that the pledge adopted by the State Democratic Executive Committee of Alabama is illegal.

30. For that it affirmatively appears from the petition that the petitioner is a resident of St. Clair County, Alabama, and shows no legal right to maintain this action in this Court.

31. For that it is not alleged that any party to this action is a resident of Jefferson County, Alabama, and within the proper jurisdiction and venue of this court.

32. For that it affirmatively appears from the face of this petition that the petitioner does not come into Court with clean hands, and that he seeks political preferment at the hands of the Democratic Party without offering to maintain party integrity, and attempts to utilize the Democratic Party to advance his political fortunes without assuming the obligations of a member of the Democratic Party.

33. For that said petition does not pray that Ben F. Ray,

as Chairman of the State Democratic Executive Committee of Alabama, make a ruling on petitioner's application of candidacy, but rather that Ben F. Ray's discretion as Chairman of the State Democratic Executive Committee be controlled in furtherance of petitioner's own political views and fortunes.

[fol. 23] 34. For that said Petition does not allege that the petitioner has exhausted his legal remedies before applying for the extraordinary writ of mandamus.

35. For that said petition does not allege that petitioner has complied with all other rules of the State Democratic Executive Committee of Alabama.

36. For that the petition does not allege that the petitioner has appealed to the State Democratic Executive Committee of Alabama for a review of the action of Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama.

37. For that it affirmatively appears from the petition that petitioner seeks a writ of mandamus to compel the Chairman of the State Democratic Executive Committee to perform an act which is beyond the lawful powers vested in him by the statutes of Alabama.

38. For that it affirmatively appears from the petition that the petitioner here seeks a writ of mandamus to compel the Chairman of the State Democratic Executive Committee to perform an ultra vires act.

39. For aught that appears from the petition, there is no statutory duty incumbent upon the Chairman of the State Democratic Executive Committee of Alabama to do what petitioner prays the Court to require him to do in this proceeding.

40. It affirmatively appears from the petition that petitioner is involved in an intra-party political controversy with the State Democratic Executive Committee of Alabama which controversy is beyond the power of jurisdiction of this Court to resolve or to make an adjudication with respect thereto.

41. For that the petition shows on its face that the petitioner seeks a judicial review of a purely political controversy.

42. For that it affirmatively appears that this action is

not brought in the name of the State of Alabama on the relation of the Attorney General of Alabama as is required by the Statutes of Alabama.

43. For that this petition prays the court to judicially legislate a new and different loyalty pledge, prepared in part by petitioner himself, contrary to the loyalty pledge required and authorized by the Statutes of the State of Alabama and the governing body of the Democratic Party of Alabama.

44. The petition shows on its face that the verification thereof by petitioner is insufficient, it not appearing from petition that petitioner has personal knowledge of matters [fol. 24] and things therein alleged to invoke the jurisdiction of this Court.

45. For that it affirmatively appears from the petition that petitioner has composed and submitted to the Chairman of the State Democratic Executive Committee of Alabama, an oath or pledge of his own drafting, and on the basis thereof asks the Court to judicially determine that such pledge, so authored by petitioner, is a legal and sufficient pledge for a candidate for nomination in a Democratic Primary election in Alabama and should be substituted for the pledge provided by said Committee.

46. For that it is not alleged in the petition that the Chairman of the State Democratic Executive Committee of Alabama is authorized to certify as a candidate in a Democratic Primary election, the name of a person filing a declaration of candidacy which contains an oath or pledge which is contrary to the oath or pledge required by the State Democratic Executive Committee of Alabama of such candidates.

47. For that it affirmatively appears from the Petition that this action is not brought in good faith by Petitioner, and that he does not come into Court with clean hands, in that he seeks to invoke the jurisdiction of the Court to compel his certification as a Democratic candidate for Presidential and vice-presidential Elector, but at the same time states that if elected, he will deliver his electoral vote to some candidate other than the Democratic nominees for President and Vice-President.

48. For that it is not alleged that Petitioner possesses the

qualifications to hold the office of Democratic nominee for Presidential and Vice-Presidential elector for Alabama, as provided by Sec. 345, Title 17, Alabama Code of 1940.

49. For that it affirmatively appears that Petitioner does not possess the qualifications of a qualified voter in the 1952 Democratic Primary elections in that he cannot subscribe to and take the pledge of such voters in said Primary Election as set out in Paragraph 4 of Petitioner's Exhibit A attached to his petition and made a part thereof by Paragraph 2 of said Petition for Mandamus.

50. For that it affirmatively appears from the Petition that petitioner is ineligible to have his name printed on any official ballot used in any primary election as a candidate for Presidential and Vice-Presidential Elector of the Democratic Party in that it affirmatively appears that he is ineligible to vote in such primary elections as required by Sec. 345, Title 17, Code of Alabama 1940.

[fol. 25] 51. For that it affirmatively appears that Petitioner seeks a writ of mandamus for a mere anticipated default of alleged duty by the Chairman of the State Democratic Executive Committee of Alabama.

52. For that said petition shows on its face that Ben F. Ray, Chairman of the State Democratic Executive Committee has not had a reasonable time to approve or disapprove petitioner's declaration of candidacy, or certify same to the Secretary of State, as Petitioner seeks to have him required to do in this proceeding.

53. Said petition is insufficient in its averments to invoke the jurisdiction of this court to grant the relief prayed for.

54. The petition presents no subject matter on which the jurisdiction of the court could operate to grant the relief prayed for.

55. The petition shows on its face that it seeks to have this court assume jurisdiction in this proceeding to nullify or circumvent the provisions of the statutes of Alabama that every State Executive Committee of a political party shall have the right, power and authority to fix and prescribe the political and other qualifications of its own members, and to fix and prescribe qualifications for candidates different from qualifications required of other electors.

56. The petition shows on its face that it seeks to have

this court to nullify the provisions of the laws of Alabama which require that a candidate of a political party must possess the political qualifications prescribed by the governing body of such political party.

57. The petition shows on its face that petitioner seeks to have this Court interfere with purely political functions of a political party without setting out any lawful basis for such interference.

58. It appears from the petition that petitioner seeks to have this Court extend its jurisdiction to direction of the political policies and functions of a political party.

59. There is a non-joinder of necessary parties defendant.

60. The petitioner seeks an adjudication of a controversy with an adversary in an unilateral or ex parte proceeding, in violation of due process.

61. The averments of the amended petition are inconsistent and repugnant, it being averred in paragraph 4 of the original petition that said Ray as such chairman has accepted petitioner's declaration of candidacy and qualification fee, and it being alleged in paragraph 6 of the original petition that said chairman will reject said declaration of candidacy and qualification fee, while it appears from [fol. 26] paragraph 6-d of the amended petition that said Ray as such chairman has assured petitioner that he is "passing on all matters presented to him (as such chairman) to the best of his ability".

62. The averments of the petition as amended that said Ray as such chairman will not certify petitioner to the Secretary of State as a candidate appear to be nothing more than conclusions of the pleader without facts being stated to sustain same.

63. The averments of the petition that said chairman will not certify petitioner as a candidate appear to be nothing more than naked conclusions of the pleader, supported only by arguments, opinions and speculations of petitioner.

64. The averments of the petition affirmatively show that petitioner is not entitled to a writ of mandamus in this proceeding.

65. The averments of the petition make out a complete defense for the chairman of said committee to the petition as amended, it affirmatively appearing therefrom that

said chairman has not rejected the declaration of candidacy filed by petitioner and has not manifested a settled purpose and determination not to certify petitioner, but that he is actively considering said declaration of candidacy and has assured petitioner in writing that he will pass upon said declaration of candidacy as one of the matters presented to him as such chairman "to the best of his ability".

66. The averments of the petition show that petitioner is attempting through letters in the form of ultimatums to said chairman, to force immediate certification of petitioner's candidacy to the Secretary of State regardless of the priority of filing of other declarations of candidacy by other candidates with said chairman, not yet certified or otherwise acted upon by said chairman.

67. Said petition shows on its face that petitioner has attempted to force, through written demands and ultimatums, and through this proceeding, certification of his candidacy in violation of the right of certification possessed by all other persons filing declarations of candidacy with said chairman prior to the time petitioner tendered his own declaration.

68. The petition is nothing more than a complaint that said chairman has not taken action in petitioner's favor which would be discriminatory and impinge upon the rights of all other persons filing prior declarations of candidacy not yet reached for disposition by said chairman.

[fol. 27] 69. For ought that appears, said chairman is processing, in the order of their filing, declarations of candidacy filed with him prior to the tendering of petitioner's declaration, and has not yet reached petitioner's declaration for a determination as to whether same should be certified.

70. Said petition does not allege that said chairman has discriminated against petitioner in discharging his duties to pass upon declarations of candidacy to determine whether declarants should be certified as candidates, it not appearing that any declarations of candidacy filed by other persons subsequent to that of petitioner have been certified to the Secretary of State or otherwise acted upon, or that any such certifications at all have been made by said chairman since said committee adopted the resolution set out in the petition.

71. It appears from the sworn declaration of petitioner's alleged candidacy set out in paragraph 3 of the petition that petitioner gratuitously inserted therein declaration contrary to and not authorized by said resolution of said committee, viz.: "I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program".

72. The petition shows that petitioner has tendered a political platform in lieu of the qualifying pledge authorized by said committee.

73. It does not appear that petitioner had the right to qualify and be certified as a candidate by filing with said chairman a political platform, viz: "I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program", in lieu of the qualifying pledge prescribed by said committee.

74. It does not appear that said chairman was under a duty to certify petitioner to the Secretary of State of an alleged declaration of candidacy containing a political platform of petitioner's own composition as set out in paragraph 3 of the petition.

75. It does not appear that this court has jurisdiction to determine whether petitioner is entitled to certification as prayed for on a declaration of candidacy containing a personal political platform of petitioner, viz: "I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program", as set out in paragraph 3 of the petition.

76. It does not appear that this court has jurisdiction to compel certification of petitioner's candidacy on the basis of [fol. 28] the insertion by petitioner of a personal political platform submitted by petitioner in lieu of the declaration of candidacy authorized by said committee.

77. It appears that petitioner in pledging himself in advance of the Democratic Primary and the general election of 1952 not to vote for Harry S. Truman or anyone advocating the "Truman-Humphrey Civil Rights Program" is restricting his right and discretion to vote if elected for whom he pleases for President and Vice-President and is likewise limiting and restricting the rights of voters of Alabama to vote for candidates for elector free to vote for

whom they please for President and Vice-President, it not appearing from the petition that there will be any nominee of any other national party not advocating such Civil Rights Program or one similar to such program in substance.

78. For ought that appears from the petition, Presidential and Vice-Presidential nominees of all political parties in 1952 will, as in past campaigns, advocate "civil rights programs" identical with or similar to the "Truman-Humphrey Civil Rights Program" and petitioner in pledging in advance not to vote for any such candidate, will, if elected, deprive the voters of Alabama of the right to full, effective representation of voting electors in the Electoral College in 1952.

79. The petition shows that petitioner seeks, herein a court ruling establishing unequal protection of the law to persons seeking to qualify as candidates in said primary election for other offices than presidential and vice-presidential elector, who would be bound to accept the loyalty pledge described by said committee in order to run as Democrats in said primary election.

80. For that it appears that neither the Federal Constitution or Constitution of the State of Alabama confers upon petitioner the right to run in said primary elections as a Democrat.

81. For that it does not appear that either the Federal or Alabama Constitution secures or guarantees the right to petitioner to run as a Democrat in said primary elections.

82. For that it appears that it would be a palpable violation of the law for said chairman to certify petitioner to the Secretary of State of Alabama for inclusion of petitioner's name on the ballot in said primary elections, upon the basis of petitioner's said declaration of candidacy.

[fol. 29] 83. Said petition fails to aver that Petitioner has complied with the conditions and provisions of the Resolution of the State Democratic Executive Committee, applicable to one seeking to become a candidate in the primaries of May 6th and June 3rd, 1952.

84. Petitioner fails to aver that he did not vote the ticket of any party or group other than the Democratic Party in the November general election 1950.

85. Petitioner fails to aver that he did not openly and

publicly oppose the election of nominees of the Democratic party in the general election of 1950.

86. Petitioner fails to aver that he pledged himself in his declaration of candidacy referred to in said petition to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States.

87. Said petition shows on its face that the affidavit of Petitioner as to his candidacy is not the same as that required by the Resolution of the State Democratic Executive Committee.

88. The affidavit of Petitioner set forth in said petition with reference to his candidacy shows that he has not complied with the Resolution of the State Democratic Executive Committee applicable to one seeking to become a candidate.

89. Said petition fails to aver that Ben F. Ray, as Chairman of the State Democratic Executive Committee, has refused to certify Petitioner as a candidate.

90. Said petition fails to aver that the time within *within* the said Ben F. Ray, as Chairman of the State Democratic Executive Committee, has to accept or reject applications of candidates has expired.

91. For that said petition shows on its face that the said Ben F. Ray, as Chairman of the State Democratic Executive Committee, has neither accepted nor rejected Petitioner's declaration of candidacy.

And for further grounds of demurrer directed specifically to the amendment filed to the original petition herein on February 2, 1952 and designated as Amendment No. 1 to the petition, and to each and every paragraph and sub-paragraph of said Amendment No. 1, separately and severally, petitioner assigns the following, separately and severally:

A. Said amendment appears to be nothing more than an argument.

B. The averments of said amendment are repugnant to [fol. 30] the original petition, and impeach the verification made by petitioner to the allegations of the original petition.

C. Said amendment appears to be a recantation of the averments made in the original petition.

D. Said amendment attempts to engraft a new cause of action against the chairman of the State Democratic Executive Committee of Alabama under the guise of alternative averments.

E. The averments of Paragraph 6-a of said amendment appear to be nothing more than mere conclusions of law without facts to sustain same.

F. The averments of said Paragraph 6-a appear to be nothing more than a technical and complex statement of an abstract principle of law.

G. The averments of said Paragraphs 6-b and 6-c of said amendment appear to be nothing more than conclusions, and inferences and arguments based upon conclusions, of the pleader.

H. The averments of said amendment are so vague, indefinite and uncertain and so completely without factual statements, that the chairman of said committee cannot draw issue thereon.

I. Said amendment fails to show that said chairman has failed to perform any lawful duty owing to petitioner.

J. Said amendment sets forth no facts warranting the granting of the extraordinary writ of mandamus.

K. The averments of said amendment appear to be nothing more than statements of opinions of petitioner.

L. The averments of said amendment affirmatively show that petitioner is not entitled to a writ of mandamus herein.

M. The averments of Paragraph 6-d of said amendment make out a complete defense on behalf of the chairman of said committee to the petition as amended, it appearing therefrom that said chairman is discharging his duties as such "to the best of his ability".

Jame J. Mayfield, Harold C. Cook, Attorneys for Respondent.

Filed in open court this 2 day of Feb., 1952.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ANSWER OF RESPONDENT, BEN F. RAY, AS CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA—Filed February 5, 1952

Comes the respondent in the above-styled cause and for answer and return to the petition of mandamus as amended and the order issued thereon, in this cause, avers and says:

[fol. 31] 1. The respondent admits the allegations of paragraph 1 of the petition except in so far as petitioner alleges that he is a "'qualified'' voter, which allegation respondent denies and demands strict proof thereof.

2. The respondent admits the allegations of paragraph 2 of the petition. But further says, however, that the said resolution, marked Petitioner's "Exhibit A," was duly and legally adopted by the State Democratic Executive Committee of Alabama, the governing body of the Democratic party, in conformity with and under the mandate of, and in compliance with its legal duty under sections 347, 345, and 348 of Title 17, Code of Alabama, 1940.

3. For answer to the first sentence of paragraph 3 respondent says that, if the petitioner earnestly and conscientiously desires to qualify as a candidate for nomination for presidential and vice-presidential elector in the 1952 Democratic Primary in Alabama, rather than lay a predicate for bringing a suit for mandamus, and further disrupting the orderly processes of the Democratic party in Alabama, he should comply with the terms of the resolution attached to his petition, "Exhibit A." This he nowhere offers to do.

The respondent admits the tendering of the ten dollars ($10) set out in paragraph 3 and admits that the petitioner offered to him the gratuitous affidavit not in conformity with the aforesaid resolution, which the petitioner sets out in words and figures in said paragraph 3, of his petition.

4. Answering paragraph 4 of the petition, the respondent denies that he "accepted" the foregoing declaration of candidacy and the sum of ten dollars ($10) tendered by the petitioner, but admits that they were offered to him and left in his office by the petitioner's attorney, Horace C. Wilkinson.

Respondent admits that he told petitioner "he wanted to think the matter over before deciding what action he would take on said declaration of candidacy." He further states that he is charged and required by law, and the rules of the State Democratic Executive Committee of Alabama, adopted pursuant to the law of Alabama, to consider and make a judicial determination upon the sufficiency of all applications, and the eligibility of all applicants who desire to become candidates in the coming Democratic Primary Election. He further states that he is charged with the judicial responsibility of determining the legality and correctness of applications for candidacy of all other persons [fol. 32] within the State of Alabama who offer to qualify for any statewide office, in the coming Democratic Primary Election; and that he does not have the right, power, or authority to precipitously approve the application of candidacy of any applicant without first inquiring into and judicially determining that said applicant is legally qualified to become a candidate in such Primary Election, and hold said office, should he be elected.

The respondent admits that the letters set out in paragraph 4 of the petition, threatening your respondent with an action of mandamus, were sent to him by the petitioner's attorney, Horace C. Wilkinson, on the same date such petition for mandamus was filed. Respondent further says that the action of the petitioner, in so threatening him with said action of mandamus, without allowing the respondent a reasonable time to exercise the judicial discretion with which he is charged under the law of Alabama, and the rules of the State Democratic Executive Committee of Alabama, is strong evidence that said application of candidacy was not presented in good faith by the petitioner, but was rather presented for the purpose of laying a predicate for this lawsuit, and attempts to disrupt and cause disunity, confusion, and discord within the ranks of the Democratic Party; in order that they might fall easy prey to their political opponents.

5. Respondent admits the allegations of paragraph 5, in so far as they are set out in the petition, but further says that this petition for mandamus was filed on the same day on which he received the threatening letter set out in para-

graph 4 of the petitioner's petition, and that he has not had and did not have a reasonable time in which to exercise the judicial discretion which he is charged with exercising under the law, before this petition for mandamus was filed, and he was peremptorily order- by this court to appear and show cause—all on the 30th day of January, 1952. Respondent further says that under the law of the State of Alabama, and the rules of the State Democratic Executive Committee of Alabama, he is required only to certify lawful applications of candidates to the Secretary of State of the State of Alabama, not less than forty days prior to the holding of the Democratic Primary on May 6, 1952.

6. Respondent emphatically denies the import of the allegation contained in paragraph 6 that he is deliberately refusing to reach a determination on petitioner's Declaration of Candidacy in order that he may not have an opportunity to "obtain relief in the Courts" or before such other [fol. 33] proper tribunal, or body as may have jurisdiction of a review of respondent's action, should respondent judicially determine that the petitioner's Application for Candidacy is insufficient under the statutes of Alabama and the rules of the State Democratic Executive Committee of Alabama adopted thereunder.

This respondent further avers that said ten-dollar ($10) qualification fee is subject to be withdrawn by petitioner until such time as this respondent shall be able to act upon petitioner's declaration of candidacy, in which event it will be retained if said declaration is found to be acceptable, or will be returned by this respondent to petitioner if such declaration should be rejected.

6-A. Respondent denies the allegations of paragraph 6-A and demands strict proof thereof.

6-B. Respondent denies that he has in any way embarrassed the petitioner as set out in paragraph 6-B of the petition, or otherwise kept, or attempted to keep, him from devoting his time to soliciting support for his candidacy, or that he has been the movant in any court proceeding against the petitioner, but rather says, in traverse thereof, that this court proceeding is of the petitioner's own choos-

ing and determination, and respondent further emphatically says that he is participating in this suit solely because of the order of this court dated January 30, 1952.

6-C. Respondent denies that he has made any public speeches as alleged in paragraph 6-C of this petition, this Honorable Court sustained and upheld the respondent's position in this case and rendered a written opinion stating that the position of the petitioner's attorney, Horace C. Wilkinson, was untenable and that no justiciable issue was presented to this court. Petitioner further states that to date the Supreme Court of Alabama has in nowise reversed, revised or changed the opinion heretofore rendered by this court, referred to in paragraph 6-C of this petition.

6-D. Respondent admits the allegations of paragraph 6-D of the petition, but assumes it to be true.

The Respondent, now having fully answered the allegations of the petition, for further answer says:

A. That the resolution attached to petitioner's petition as Exhibit A was duly and lawfully adopted by the State Democratic Executive Committee of Alabama, in a regularly scheduled meeting, held in Montgomery, Alabama on January 26, 1952; that said resolution was adopted in strict [fol. 34] conformity with Sections 336 to 424, both inclusive, of Title 17 of the Code of Alabama, 1940, and the amendments thereto; that your respondent has no legal right or authority to deviate from or adopt a resolution of his own or ratify a resolution of the petitioner's contrary to and repugnant to the law of the State of Alabama, and the rules of the State Democratic Executive Committee of Alabama, adopted in pursuance thereof.

B. The rules adopted by the State Democratic Executive Committee of Alabama including the said resolution of January 26, 1952, do not contravene any provisions of the Federal or State Constitutions or the laws of the State of Alabama or of the United States.

That the rules of the State Democratic Executive Committee of Alabama, copy of which is hereto attached, marked Exhibit 1 and made a part hereof, adopted in conformity with the appropriate Sections of Title 17 of the Code of

Alabama, 1940, above mentioned, provide, among other things:

"5. The Chairman of this Committee is authorized and empowered to reject declarations of candidacy, with or without a trial before the Committee notwithstanding the affidavit, if he believes the affidavit to be untrue, with the right of appeal on the part of the candidate to the Executive Committee for review. . . .

"7. . . . In emergencies, the Chairman at his discretion may take a vote of the membership by mail or by referendum on any matter except as otherwise provided by law or the Rules of this Committee, he fixing the time to vote, but a vote so taken, shall not be opened or cast at a meeting . . .

"12. . . . The State Committee, except as otherwise provided by law, has sovereign, original, appellate and supervisory power and jurisdiction of all party matters throughout the State and each County thereof. It is empowered and authorized to prescribe and enforce rules, regulations, and penalties against the violation of party fealty including the removing or disbarring from party office, or party privilege anyone within its jurisdiction, including a member of this committee, who violates such fealty or its rules, or its other lawful mandates."

C. Respondent avers that petitioner has at no time requested or asked the respondent for an appeal to the State Democratic Executive Committee of Alabama, the proper Party Tribunal, should the respondent's determination of the sufficiency of petitioner's application be determined [fol. 35] against him. Petitioner has neither requested an appeal to the State Democratic Executive Committee or asked the respondent to expeditiously take a mail ballot on the sufficiency of the petitioner's Declaration of Candidacy.

The petitioner, has on the contrary, by his course of action, manifested an intention to ignore and defy the lawful rules of the State Democratic Executive Committee of Alabama, and to pursue his petition for mandamus without first taking an appeal to the State Democratic Executive Committee of Alabama, as provided by law and its rules and regulations, should the respondent's decision be contrary to petitioner's claim.

D. Respondent further avers that the petitioner does not come into this court with clean hands.

E. Respondent, for further answer and in the alternative, avers that the petitioner in this cause does not possess the qualifications fixed by the governing body of the Democratic party for candidates for the office for which he seeks to qualify.

F. Respondent further avers, and also in the alternative, that he has not been presented heretofore or had filed with him a declaration of candidacy by the petitioner in the form prescribed by the governing body of the Democratic party.

G. Respondent further avers that the affidavit of petitioner contains extraneous matter and gratuitous statements that make such affidavit invalid as a declaration of candidacy.

Wherefore, Respondent prays that the petition be dismissed and that said Writ, or Order, be discharged at the cost of the petitioner.

Harold M. Cook, James J. Mayfield, Attorneys for respondent.

STATE OF ALABAMA,
Jefferson County:

Before me, George A. LeMaistre, a notary public in and for said county and state, personally appeared Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, who is know to me, and who, after being by me first duly sworn, deposes and says that he is conversant with the facts set out in the foregoing answer, that he is informed and believes them to be true, and on such information and belief states that they are true and correct.

Ben F. Ray.

[fol. 36] Sworn to and subscribed before me, this 5th day of February, 1952. George A. LeMaistre, Notary Public, State at Large.

Exhibit 1. To Answer

Rules of the Democratic Party of Alabama

With all amendments to and including January 15, 1951.

(Emblem of Democratic Party)
White Supremacy
for the Right
Democratic Party
X

The following rules are ordained and established by the State Democratic Executive Committee of Alabama:

1. This Committee shall be known as the State Democratic Executive Committee of Alabama, and may be called the State Committee.

2. This committee shall be composed of seventy-two members eight from each congressional district, chosen by plurality vote by the plan in force at the time of the election. The member receiving the highest vote in his district shall be the member for the State at large from that district. Should there be a tie vote for the highest place and/or should all the members receive the same vote, then the Committee shall elect one member therefrom as a member from the state at large. Each must be a qualified elector, and shall have and retain his citizenship by permanently removing from said district, then shall constitute a vacancy in such membership. Vacancy in membership from any cause will be filled for the unexpired term by the State Committee at the next meeting following the vacancy. The term of membership begins on the first Monday after the second Tuesday in January next after the election and is for four years from the time of their installation in office and until their successors are elected and qualified.

3. The state committee shall meet at such time and place as the committee may determine or a majority thereof, or upon the call of the chairman.

4. The State Democratic Executive Committee of Alabama shall review, on appeal, the decision of the county committees in all cases concerning the nomination of county officers and all matters relating to rules and policies. The

State committee has supervisory power over county committees and is authorized of its own motion to set aside any action of a county committee which it may deem proper. [fol. 37] 5. The officers of this committee are (a) Chairman; (b) Vice-Chairman; (c) Vice-Chairman of Women's Division; (d) Secretary; (e) Treasurer and a Chairman pro tem may be chosen for a full meeting or any part thereof. A Secretary pro tem, may be appointed by the Chairman as occasion may require. The Treasurer shall be appointed by the Chairman and the Treasurer and Secretary need not be members. The offices of Secretary and Treasurer, when deemed advisable, may be filled by the same person, but the Treasurer may be a banking institution. The Secretary and Treasurer shall at all times be under the direction of the Chairman and shall report and serve as required by him, and all appointees of the Chairman hold at his pleasure.

The Chairman is authorized to appoint a stenographer or reporter to take the minutes of the meetings; also, any other agents or assistants as may be necessary.

The Chairman of this committee is authorized and empowered to reject declarations of candidacy, with or without a trial before the committee, notwithstanding the affidavit, if he believes the affidavit to be untrue, with a right of appeal on the part of the candidate to the Executive Committee for review.

6. Unless otherwise provided for in these rules, the rules as to parliamentary procedure governing the House of Representatives of this State, shall be of force and govern in all meetings of this committee or any sub-committee or committees thereof.

7. The order of business shall be as follows:

1. Assembly and roll-call. 2. Minutes, unless dispensed with. 3. New Business, in the call or otherwise. 4. Unfinished business, old or new. 5. Vacancies in membership filed. 6. Adjournment.

The order of business may be changed at any time by the Chairman in absence of objection.

The State Chairman votes, and if a tie occurs the proposition is lost.

In emergencies the Chairman, at his discretion may take

a vote of the membership by mail or referendum on any matter, except as otherwise provided by law or the rules of this Committee, he fixing the time to vote, but a vote so taken shall not be opened or cast at a meeting.

Proxies are never allowed.

Suspension of rules may be had by two thirds concurring vote of those voting, provided at least a quorum vote, [fol. 38] but shall not be had by referendum or mail.

Order of procedure of motions and the like shall be as follows: 1. Adjourn. 2. Adjourn to fix time. 3. Referring to Committees. 4. Postpone indefinitely. 5. Previous questions. 6. Lay on the table. 7. Postpone to fixed time. 8. Amend.

8. At all meetings of the Committee, a majority vote shall prevail except upon motion to change or suspend the rules established for the government of this committee.

9. Seventeen members, or such number of members as may be required by law of the committee shall constitute a quorum.

10. There shall be an executive committee, composed of one member from each Congressional district to be appointed by the Chairman of the State Committee, subject to the approval of the committee. It shall be their duty to execute and carry out the plans of the State Committee as the same shall from time to time, be laid down by that committee, under whose authority it shall act. The Chairman of this committee shall be an ex-officio member and Chairman of the said executive committee. Five members shall constitute a quorum.

11. A finance committee of not over seven members, consisting of the State Chairman and not less than two nor more than six others, any three of whom may act by majority, may be named, changed, discharged, wholly or in part, from time to time as deemed, best by the Chairman, for the purpose and with the power of aiding him in auditing and determining and allowing or rejecting claims and in expending funds, or in other financial matters, as desired by him from time to time, and to be known by such name as he may desire.

12. The State Committee, except as otherwise provided, by law has sovereign, original, appellate, and supervisory power and jurisdiction of all party matters throughout the

state, and each county thereof. It is empowered and authorized to prescribe and enforce rules, regulations and penalties against the violation of party fealty including removing or debarring from party office or party privilege anyone within its jurisdiction, including a member of this committee, who violates such fealty or its rules, or its other lawful mandate.

13. Only those candidates who have qualified as required by law and who have also complied with the rules and regulations fixed by this committee shall be voted for in any primary election. It shall not be permissible to write or stamp [fol. 39] in any name not officially printed on the primary ballot in any primary election, except the names of beat committeemen may be so written or stamped.

14. The chairman of this committee is hereby authorized and empowered to create any special or sub-committee as may be desired.

15. The term of office of members of the county committee shall begin on the first Monday after the Second Tuesday in January next after their election and shall continue for four years, and until their successors are elected and qualified.

16. Funds of the Committee shall be kept on deposit in bank in the Committee's name or the name of the sub-committee as the case may be. The State Chairman may place funds to the bank credit of the sub-committee from time to time as convenience may suggest. Funds shall be disbursed by bank draft or check drawn by the Treasurer and countersigned by the Chairman or when more convenient, drawn by the Chairman, of either, against funds to its credit.

Assessment payments by candidates shall be required as per statutes, and if statutes should not expressly permit, then only by way of request.

Assessments are fixed by the State Committee, or its sub-committee duly authorized, as to all offices filled by the vote of territory greater than a single county, and by county executive committees as to all office, filled by the vote of a single county or less territory, except congressmen from a district of only one county as to which the State Committee shall fix the assessment.

Obligations of this Committee or its sub-committee, may be paid by the State Chairman or sub-chairman as the case may be, out of committee funds, without waiting for a meeting of the State Committee.

17. Sub-committees may incur the reasonable and necessary expense of carrying out their purpose and shall report the receipts, disbursements, and expenses. The actual and necessary expense of a member of a sub-committee incurred by him for traveling within the State, or in the necessary discharge of his duty as such committeemen, may be paid out of the State Committee's general funds, but shall not be taxed as any part of the costs of a contest or appeal on contest.

The State Chairman's expenses, whether for postage, stationery, long or short distance telephone or telegraph messages, freight, express, parcel post, railroad or other transportation, office help, or other expense incurred in attending meetings of any of the sub-committees of the State Committee as requisite, or otherwise incurred in the dis-[fol. 40] charge of the duties of his office except attending meetings of the State Committee, shall be paid or reimbursed from the Committee's general fund.

Accounts of officers, sub-committee, agents, should be audited from time to time, especially at the ends of campaigns, and the Chairman may appoint a committee therefor, at any time of not over three members in his discretion.

18. State office includes any that is state-wide or filled by the vote of the whole State, and any office of which the whole or greater part of the emolument is paid by the State. State Executive Committeeman is a State party officer.

A district, circuit or division office is one filled by the vote of a district, division or circuit.

And a county office includes any other office than the above stated, that may be filled by the vote of a single county or less territory.

19. (A) Whenever a special election is called to fill a State office, or the office of representative in congress, except, the offices of State Senator and Representative, the State Committee may in its discretion, nominate a candidate of the Party therefor, or provide for a nomination by primary election or convention or other method in vogue in

the Party at the time. Where there is ample time for using the customary method primary or convention, etc., then that should be used. But the Committee determines as to the emergency or circumstances.

(B) When the special election is for the office of State Senator in a district embracing more than one county, the State Chairman in conjunction with the members of the State Committee residing in the territory affected, or a majority of them, present at a meeting called by the State Chairman for that purpose may nominate a candidate of the party therefor.

(C) When the special election is for any county office or for representative or state senator in a district of only one county, the county executive committee may act, in the same way, and with like power and duty regarding such office, as first above provided for the State Committee.

(D) Certificates of nomination shall be promptly made by the same presiding officer or other officers as in cases of nominations at primary elections or conventions.

[fol. 41] (E) When a nomination has been made and becomes vacant before the election, the vacancy may be filled by use of any of the above stated plans for making nominations for special elections that may be applicable or adaptable to use, in the judgment of the State Chairman who shall advise or direct action as occasion may suggest or require.

But a vacant nomination for a circuit judgeship filled by the vote of a single county shall be filled by the State Committee under subdivision (A) above.

The nomination filled shall be certified as requisite for the original nomination.

20. These rules may be amended, altered, or repealed, after written notice, showing what change is proposed, furnished the members of committee ten days before any regular or called meeting of the State Committee. If the change be proposed at a meeting, it shall lie over at least twelve hours.

Such amendment or alteration or repeal shall be adopted or carried by a vote of a majority of the members voting, if a quorum votes, and if taken on referendum votes, and if taken on referendum or by mail, it shall require a concurring majority of all members of the State Committee to effect the change or amendment.

21. The State Committee may make any rules or regulations for the purpose of enforcing these rules—not inconsistent therewith.

STATE OF ALABAMA .
County of Jefferson

I, Ben F. Ray, Chairman of the State Democratic Executive Committee of Alabama, do hereby certify that I am the custodian of the records of the said State Democratic Executive Committee of Alabama, and that the foregoing is a full, true and correct copy of the rules ordained and established by the State Democratic Executive Committee of Alabama, as shown by the records of my office, with all amendments thereto up to and including January 15, 1951.

Witness my hand and the seal of the said State Democratic Executive Committee of Alabama, at Birmingham, Alabama on this first day of March, 1951.

Ben F. Ray, Chairman of the State Democratic Executive Committee of Alabama. (Seal.)

Filed in open court this 5th day of February 1952.

[fol. 42] IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDMENT NUMBER TWO TO PETITION—Filed Feb. 6, 1952

By leave of the Court first had and obtained, petitioner amends the prayer of his petition by adding at the end thereof the following words:

And petitioner further prays that the court will include in the writ of mandamus to the said Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, a paragraph commanding him to proceed with his statutory duties as though the Resolution of the State Democratic Executive Committee of Alabama, at its meeting held in Montgomery, Alabama, on Saturday, January 26, 1952, did not contain the words,

"And also the nominees of the National Convention of the Democratic Party for President and Vice-President of

the United States, "in paragraph (4) and did not contain the words "I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States", in paragraph (5), and did not contain the words, "and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States' in paragraph (6) in said Resolution."

and specifically commanding him to desist and refrain from enforcing the quoted provisions of said Resolution in certifying the names of candidates for nomination in the 1952 Democratic Primary to the Secretary of State of Alabama.

Horace C. Wilkinson, Attorney for Petitioner.

Duly sworn to by Horace C. Wilkinson. Jurat omitted in printing.

[fol. 43] In Circuit Court of Jefferson County

Minute Entry

Ex Parte Edmund Blair, Petitioner

vs.

Ben F. Ray as Chairman, State Democratic Executive Committee of Alabama, Respondent

Present and Presiding, J. Russell McElroy, Whit Windham, Judges of Circuit Court

On this the 2nd day of February, 1952, came the Petitioner by his attorneys, also came Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama, and files written "Motion for Continuance", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion for Continuance" be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama files "Motion to Quash Summons", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion to Quash Summons" be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama files "Motion to Quash Order to Show Cause or Alternate Writ of Mandamus", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion to Quash Order to Show Cause or Alternate Writ of Mandamus", be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts; Petitioner amends petition by separate paper this day filed headed "Amendment #1 To Petition"; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama refiles his written "Motion for Continuance", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion for Continuance" be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama refiles his "Motion to Quash Summons", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion to Quash Summons" be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic [fol. 44] Executive Committee of Alabama excepts; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama refiles his "Motion to Quash Order to Show Cause or Alternate Writ of Mandamus", and after due hearing and submission of said motion,

It is ordered and adjudged by the court that said "Motion to Quash Order to Show Cause or Alternate Writ of Mandamus", be and the same is hereby overruled, and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts; Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama files demurrer to petition as last amended.

On this the 4th day of February, 1952, came the Peti-

tioner by his attorneys, also came Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama, and after due hearing and submission of said demurrer to petition as last amended,

It is ordered and adjudged by the court that said demurrer of Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama, to the petition as last amended, be and the same is hereby overruled, and to this action, ruling and judgment of the court said Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama excepts.

On this the 5th day of February, 1952, came the Petitioner by his attorneys, also came the Respondent, Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama, and files written answer to the petition as last amended; The Petifioner states to the court that he denies the truth of each and every averment in said answer.

On this the 6th day of February, 1952, came the Petitioner by his attorneys, also came Respondent, Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama; the Petitioner, Edmund Blair, offers to amend his petition by document this day filed, headed "Amendment Number Two"; the respondent objects to the allowance of said proposed amendment, and said objection is by the court heard and considered, whereupon,

It is ordered and adjudged by the court that said objection be and the same is hereby sustained, and the Petitioner excepts.

February 6, 1952, this cause coming on to be heard was duly and regularly heard and submitted to the court for judgment upon the merits, and said submission having been duly considered by the court, and the court, after such consideration, being of the opinion that the petitioner is entitled to the relief prayed for in the petition as amended, [fol. 45] it is ordered, adjudged and decreed by the court that a peremptory writ of mandamus do forthwith issue from this court, directed to the Honorable Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama ordering, directing and commanding him to certify to the Secretary of State of Alabama not less than

forty days prior to May 6, 1952, the name of Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in the Primary Election of the Democratic Party to be held on May 6, 1952 and respondent excepts.

It is further ordered, adjudged and decreed by the court that the petitioner herein have and recover of the defendant herein, namely, the Honorable Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, all costs herein accrued for which execution may issue, and respondent excepts.

IN CIRCUIT COURT OF JEFFERSON COUNTY, CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

PEREMPTORY WRIT OF MANDAMUS AND NOTICE—February 6, 1942

THE STATE OF ALABAMA,
Jefferson County:

To any Sheriff of said State—Greeting:

You are hereby commanded to serve a copy of the within process on Ben F. Ray, as Chairman of the State Democratic Executive Committee Respondent and make due return of how you have executed same.

Witness my hand, this February 6, 1952.

Julian Swift, Circuit Clerk.

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 25914-X

THE STATE OF ALABAMA,
Jefferson County.

EDMUND BLAIR, Petitioner,

— VS.

BEN F. RAY as Chairman of the State Democratic Executive Committee, Respondent.

To—Ben F. Ray as Chairman of the State Democratic Executive Committee, Respondent:

Whereas, Petitioner exhibited his petition to the Honorable J. Russell McElroy, Judge of said Court, praying among other things that a writ of Mandamus be issued out of this Honorable Court directed to the said Honorable Ben F. Ray as Chairman of the State Democratic Executive Committee directing and commanding him to certify to the Secretary of State not less than forty days prior to the date of holding the Democratic Primary on May 6, 1952, the name of Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in said [fol. 46] primary election.

And whereas upon the hearing of said matter the said Judges J. Russell McElroy and Whit Windham, did order that a Writ of Mandamus issue out of this Court to the Respondent Ben F. Ray as Chairman of the State Democratic Executive Committee.

Now, therefore, you are hereby commanded to certify to the Secretary of State of Alabama not less than forty days prior to May 6, 1952, the name of Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in the Primary Election of the Democratic Party to be held on May 6, 1952.

Witness my hand this 6th day of February, 1952.

Julian Swift, Clerk of the Circuit Court.

Sheriff's Return

Executed this the 7th day of Feb. 1952 by leaving a copy of the within with Ben F. Ray, as Chairman of the State Democratic Executive Committee.

Holt A. McDowell, Sheriff, Jefferson County, Alabama. By Ben L. Ingram, D. S.

In Circuit Court of Jefferson County, Circuit Court, Tenth Judicial Circuit of Alabama

Security for Costs to Supreme Court

Security for Costs of Appeal to the Supreme Court

No. 25914-X

The State of Alabama,
Jefferson County:

Edmund Blair, Petitioner

vs.

Ben F. Ray as Chairman of the State Democratic Executive Committee, Respondent

We hereby acknowledge ourselves security for costs of appeal to Supreme Court in the above case, returnable to the present term thereof. And for the payment of the above bond, we hereby waive our right of exemption to personal property under the Constitution and Laws of the State of Alabama.

Ben F. Ray, As Chairman of State Democratic Executive Committee of Alabama, National Surety Corporation. (L. S.) Jno. W. Gibbs, Attorney-in-fact. (L. S.)

Taken and approved, the 7 day of February 1952.

Julian Swift, Circuit Clerk. (Seal.)

Filed in office Feb. 7, 1952.

[fols. 47-48] IN CIRCUIT COURT OF JEFFERSON COUNTY, CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

CITATION OF APPEAL TO SUPREME COURT—February 8, 1952

THE STATE OF ALABAMA,
Jefferson County:

To Edmund Blair, Petitioner, or Wilkinson & Skinner, Attorneys of Record for the Petitioner—Greeting:

Whereas, Ben F. Ray as Chairman of State Democratic Executive Committee of Alabama has taken an appeal from the judgment by the Circuit Court of the Tenth Judicial Circuit of Alabama, for the County of Jefferson, State of Alabama, in the cause wherein Edmund Blair is Petitioner and Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama is Respondent.

Now, you are, therefore, cited to appear at the NEXT Term 1952, of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper to do so.

Witness my hand, this 8th day of February 1952.

Julian Swift, Circuit Clerk.

SHERIFF'S RETURN

Executed this the 8th day of Feb., 1952 on Wilkinson and Skinner Attorneys for Petitioner by leaving a copy of within with Eloise Bennett, Agent of said Attys.

Holt A. McDowell, Sheriff, Jefferson County, Alabama. By Ben L. Ingram, D. S.

[fol. 49] [Stamp:] Filed in Office, Feb. 15, 1952. Julian Swift, Clerk, Circuit Court

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY

Number 25914-X

Ex Parte Edmund Blair—Petitioner

TRANSCRIPT OF EVIDENCE

The above entitled matter came on for hearing before the Hon. J. Russell McElroy and Whit Windham, Judges, commencing at 9:00 A.M., February 2, 1952, when the following proceedings were had and done:

APPEARANCES

Mr. Horace C. Wilkinson, of the firm of Wilkinson & Skinner, Farley Building, Birmingham, Alabama, for the Petitioner.

Mr. Harold M. Cook, Frank Nelson Building, Birmingham, Alabama, and Mr. James Mayfield, Tuscaloosa, Alabama, for Mr. Ben F. Ray, as Chairman of the State Executive Democratic Committee.

PROCEEDINGS

STIPULATION OF FACT

Pleadings were settled and argument had on the pleadings, following which the following occurred:

Mr. Mayfield: We will be willing to stipulate he is a qualified voter of St. Clair County, and has been since 1932.

Judge McElroy: Continuous from that time up to the present time?

Mr. Mayfield: Is that a fact, Judge?

Mr. Wilkinson: Yes, sir.

Judge McElroy: That answers that.

Mr. Cook: But, if the Court pleases, we are not agreeing to give up the point we have reserved in our demurrer to the petition, that he is not eligible to vote in this primary. We contend he is not an eligible candidate because he is uneligible to participate in the primary because of his un-

willingness to sign a pledge to support the National Democrat nominee.

Judge Windham: Off the record.

[fol. 50] (Whereupon, ensued an off the record discussion, following which the following occurred:)

Judge Windham: As I understand it, these gentlemen have stated that they are willing to stipulate that Mr. Blair is a registered voter in St. Clair County and has been such since 1932 on up until now, and was then and continuously since then, and including now, is a qualified voter in St. Clair County, Alabama, but that does not mean they are willing to concede that as such registered and qualified voter that he has any right to come into and vote in the primary election of May of this year and June of this year.

Mr. Wilkinson: I don't ask them to concede that.

Judge Windham: I am talking about the stipulation. There is no doubt about the extent of the stipulation, gentlemen.

Mr. Mayfield: We agree to that, Judge.

Mr. Wilkinson: Yes, sir; that is all I want.

I will also want demonstrated on the record this whole proceeding before the committee is styled, "The following resolution was adopted by the State Democratic Executive Committee of Alabama at its meeting in Montgomery, Alabama, on Saturday, January 26, 1952."

Judge Windham: If there is nothing further, gentlemen, we will adjourn now until 9:00 A.M. in the morning.

(Whereupon, at 3:36 P.M., February 4, 1952, an adjournment was had until 9:00 A.M., February 5, 1952, at which time proceedings were resumed as follows:)

[fol. 51] February 5, 1952—9:00 A.M.

Court Reconvened Pursuant to Adjournment

Judge McElroy: All right, gentlemen, let's proceed.

Mr. Wilkinson: We will examine Mr. Blair.

Evidence on Behalf of the Petitioner

Edmund Blair, called as a witness, being duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Wilkinson:

Q. Your name is Edmund Blair?

A. Yes, sir.

Q. You are the petitioner in this proceeding?

A. Yes, sir.

Q. Mr. Blair, in paragraph 7 of your petition it is alleged that you mailed the Secretary of State a statement required by the Corrupt Practice Act.

Do you have a copy of that statement you mailed to the Secretary of State and her acknowledgment of it?

A. Yes, sir.

Q. Let me have them, please, sir.

A. (Witness hands papers to counsel for petitioner.)

Mr. Wilkinson: Mr. Mayfield, look at these.

Mr. Mayfield: Judge Wilkinson, we don't take issue with that statement.

Mr. Wilkinson: You said something about assuming it was true, I just want to be certain it is proved beyond any question.

Q. This carbon copy of your statement to the Secretary of State, did you sign that in your handwriting before sending the original off?

A. Yes, sir.

Q. And this written copy, have you signed?

A. Yes, sir.

Mr. Wilkinson: We offer as Petitioner's Exhibit No. 1 the statement dated January 30, 1952, to the Secretary of State.

Q. And this letter dated February 1, 1952, is from the Secretary of State acknowledging receipt of this paper that you sent down there?

[fol. 52] A. Yes, sir.

Mr. Wilkinson: We offer that as Petitioner's Exhibit 2.

Mr. Mayfield: We object, if the court pleases.

Judge Windham: What are the grounds of objection?

Mr. Mayfield: The grounds are: Incompetent, irrelevant, and immaterial it is not a question of whether or not he is qualified with the Secretary of State; that couldn't have anything to do with his right to mandamus the Chairman of the State Democratic Executive Committee.

Judge Windham: As I understand it, incompetent, irrelevant, and immaterial, and then this last ground which you just stated?

Mr. Mayfield: Yes, sir.

Mr. Cook: It wouldn't be binding on the Respondents, if the court pleases.

Judge McElroy: I understand you gentlemen are saying you have not really raised any question about his having filed the correct paper with the Secretary of State.

Mr. Mayfield: That is right, therefore, we think it is incompetent, irrelevant, and immaterial.

Judge McElroy: Do we understand by that you concede he has actually filed such document?

Mr. Mayfield: We stated we had no knowledge of it, and assume his sworn allegation to be true.

Judge McElroy: You don't deny it?

Mr. Mayfield: No, sir.

Judge McElroy: Sustain the objection on that. The Respondent concedes that it was filed.

Judge Windham: But he does not concede that it would be relevant or material.

Mr. Wilkinson: We reserve.

Mr. Cook: If the court pleases, does that apply to both letters?

Judge Windham: Yes, sir; to each of them.

Mr. Wilkinson: We reserve an exception.

(Whereupon, said letter on the letterhead of St. Clair News-Aegis, from Edmund Blair to the Honorable Secre-

[fol. 53] tary of State under date of January 30, 1952, was

marked for identification Petitioner's Exhibit No. 1; said letter under date of February 1, 1952, on the letterhead of the State of Alabama, Office of Secretary of State to Mr. Edmund Blair was received in evidence and marked "Petitioner's Exhibit 2 for identification"; said letters being in words and figures as follows:)

PETITIONER'S EXHIBIT No. 1

ST. CLAIR NEWS-AEGIS

Pell City, Alabama

Hon. Secretary of State, State Capitol, Montgomery, Alabama..

"Pursuant to section 274, title 17, Alabama Code of 1940, I designate myself as a person elected to receive, expend, audit, and disperse all monies contributed, donated, subscribed, or in any way furnished or raised for the purpose of aiding or promoting my nomination as Presidential or Vice Presidential Elector."

Edmund Blair

This the 30th day of January, 1952.

PETITIONER'S EXHIBIT No. 2

Mr. Edmund Blair, Publisher, St. Clair News-Aegis, Pell City, Alabama.

Dear Sir:

I have for acknowledgment declaration of your candidacy for the office of Presidential or Vice Presidential Elector in the Democratic Primary elections to be held on May 6, 1952, and June 3, 1952, in pursuance of Title 17, Section 274 of the Code of Alabama of 1940. Your qualifying fee should be paid to and your declaration of candidacy should also be filed with Hon. Ben F. Ray, Chairman of the State Democratic Executive Committee, 710 Massey Building, [fol. 54] Birmingham, Alabama, on or before March 1st.

Yours very truly,

(S) Mrs. Agnes Baggett, Secretary of State.

Mr. Wilkinson: I believe that is all.

Cross-examination.

By Mr. Mayfield.

Q. Mr. Blair, I believe your petition alleges that you are a resident of St. Clair, Alabama, does it not?

A. That is right.

Q. What type of business are you engaged in, Mr. Blair?

A. I am a newspaper publisher and reporter.

Q. And what newspaper do you publish there?

A. Well, at that time it was the Pell City News and the Leeds News and the Southern Aegis, and the Pell City News and the Southern Aegis were combined and it is known now as the . Clair News-Aegis.

Q. What newspaper were you publishing in 1948?

A. Pell City News, Southern Aegis, and the Leeds News.

Q. Are you the owner of that newspaper?

A. Yes, sir.

Q. Are you the sole owner?

A. Yes, sir, my wife and I are.

Q. Do you control the editorial policy of that newspaper, or did you, at that time?

A. Yes, sir.

Judge Windham: You mean in '48?

Mr. Mayfield: Yes, sir.

Judge Windham: You mean each one of the three he named?

Mr. Mayfield: Yes, sir.

Judge Windham: Is that true?

The Witness: Yes, sir.

Q. You have not at any time allowed any editorials to appear in your newspaper that were contrary to your own political belief and faith, have you?

A. I don't think so. I don't think so. I am not going to be [fol. 55] positive about that.

Q. That is your best judgment?

A. That is right.

Q. Now, you were elected an elector in the State Democratic Primary and nominated in the election in November, 1948, were you not?

A. That is right.

Q. For whom did you cast your electoral ballot?

A. For Mr. Thurmond and Mr. Wright.

Q. For Thurmond and Wright?

A. That is right.

Q. You voted in the primary election of that year, did you not?

A. Yes, sir.

Q. Did you notice and read the pledge on the ballot at that time?

Mr. Wilkinson: We object to that as being incompetent, irrelevant, immaterial, and illegal.

Q. Did you have knowledge of the pledge on the ballot at the time you—in 1948 at the time you cast your ballot in the Democratic Primary Election?

A. Did I have knowledge that it was there?

Q. Yes, sir.

A. I suppose so, in a general way. I am reasonably sure I didn't read it.

Q. Yes, sir. Did you subscribe to that pledge at the time you cast your vote, or did you have mental reservations?

Mr. Wilkinson: We object to that; calls for a mental operation of the witness; conclusion; invades the province of the court; incompetent, irrelevant, immaterial and illegal.

Judge McElroy: I would like to know the relevancy of that.

Judge Windham: I would. I was wondering in what way that enters into the picture.

Mr. Mayfield: We are trying to determine, if the court pleases, whether or not he is qualified to come into this Democratic primary.

Judge Windham: You mean as a voter?

Mr. Mayfield: Yes, sir, as a voter, because if he is not [fol. 56] qualified as a voter in the coming Democratic primary he cannot be qualified as a candidate.

Judge Windham: Under what rules of the State Committee?

Judge McElroy: What rules?

Mr. Mayfield: Title 17, Section 345.

Mr. Wilkinson: This court judicially knows that Mr. Wright and Mr. Thurmond were nominated by the Democratic Party of Alabama as their candidate for President

and Vice President, and every man who voted for the electors pledged them and voted the Democratic ticket in Alabama, and this inquiry has no relevancy whatever to this proceeding.

Judge McElroy: Title 17, Section 345, is that the one about the ballot?

Judge Windham: I will read it, gentlemen:

> "The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party."

Now, as I understand it, on that issue your question should go to the matter of whether or not he is eligible to vote in the Democratic—in the primary election of May, of this year.

Mr. Mayfield: Yes, sir.

Judge Windham: Now, let me ask you this question: What are the regulations, either of law or of the Democratic Executive Committee, under which you say he is not eligible, or you purport to prove he is not eligible to vote in this primary this year?

Mr. Mayfield: We believe if he is not a member of the Democratic faith—for instance, we don't allege he is a Republican—but if he is not a member of the Democratic faith, for instance, where Republicans come into our primary and vote, we believe that to be a fraud on the Democratic Party of Alabama.

Judge Windham: What rule or specification of the statute is that?

[fol. 57] Mr. Mayfield: The section you have, the question of whether or not he is—as far as the rules are concerned, I might call your Honor's——

Mr. Cook: If your Honor pleases, Section 350 contains the pledge, and if he didn't live up to that pledge, we submit and construe, under the letters of the Committee, he would not be eligible to participate in this primary.

We are inquiring whether or not he took the pledge,

adopted the pledge, then whether he voted and whether or not he lived up to it later.

Mr. Mayfield: I might further point out to your Honor that Rule 12 of the State Democratic Committee provides this:

> "The State Committee, except as otherwise provided by law has sovereign, original, appellate, and supervisory power and jurisdiction of all party matters throughout the State, and each County thereof. It is empowered and authorized to prescribe and enforce rules, regulations, and penalties against the violation of party fealty including removing or debarring from party office or party privilege anyone within its jurisdiction, including a member of this Committee, who violates such fealty or its rule, or its other lawful mandate."

Judge Windham: Are you speaking about some future action that you propose might be taken by the Committee to disbar him from the privilege of voting in the primary, or are you speaking about the status that he had at the time he filed his papers?

Mr. Mayfield: We are speaking about the status that—what we are trying to inquire into is his status as to party fealty at the time he filed this declaration. That is a matter to be determined by the State Democratic Executive Committee, and the Chairman of the State Democratic Executive Committee, who is the Chief Executive and judicial officer of said Committee, is here and a party Respondent in this writ of mandamus.

Judge Windham: Mr. Cook called attention to Section 350, the matter that appeared on the bottom of the ballot in the primary election which reads thusly:

[fol. 58] "By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election."

If he voted in the primary election of that year, which he has already said he did, the Democratic primary, and then,

if in the November election he voted the Democratic ticket, do you propose that there is some other——

Mr. Mayfield: We take this position, Judge Windham, on the rule of evidence before—now before the court that the question of whether or not—I hate to argue the rules of evidence to your Honor and Judge McElroy as I know you are so much better acquainted with the rule, but our position is this; that we have here a question of status; that is, what his status is, whether he is or is not a Democrat, and the rules of evidence, as we understand them, are in order to determine a status, for instance, by way of parallel, domicile, that his actions relative to that status are admissible evidence to show the conduct of that status.

Judge McElroy: Let me ask you the question. You are questioning is he a Democrat?

Mr. Mayfield: Yes, sir.

Judge McElroy: I would like to know—I would like for you to define for us what you mean by the word Democrat, and by what authority such definition constitutes a Democrat under the law.

Now, certainly, if a man's right to vote or to be a candidate is to be determined by whether he is or is not a Democrat, then the court has to know who is a Democrat; what is the final test, the essential indispensable characteristics of a Democrat?

Mr. Mayfield: Since I have been asked the question by the court, I can only answer it according to my own judgment, but I would state that in my opinion a Democrat is one who subscribes to the principles of democracy as defined by Thomas Jefferson rather than Judge Horace Wilkinson. I would further state a Democrat believes in government from the bottom up rather than from the top down, and a Democrat is one who, when he goes into a primary and votes [fol. 59] for and elects representatives to act for him, is one who is willing to abide by the results of the majority.

Mr. Cook: And one who subscribes to the rules and regulations of the governing body of his party.

Mr. Mayfield: And one who subscribes to the rules and regulations of the governing body of his party, where he has had an opportunity to vote for and elect representatives of that party.

Mr. Wilkinson: Are you giving us the authority for that very elaborate definition for a Democrat, or is that Mayfield on democracy?

Mr. Mayfield: That is Mayfield on democracy.

Mr. Wilkinson: You have no other authority to support that?

Judge Windham: Let me ask the witness a question, and I would like for you gentlemen to feel free on either side to object, but I thought maybe we might almost in one question and one answer get before us the background.

The witness said here, I suppose, unofficially on one occasion, something about he had always voted the Democratic ticket, but I want to ask him this question:

Did you say to us that you voted in the Democratic primary in 1948 and thereafter cast your vote also in the general election of that year and in that general election you voted the Democratic ticket?

The Witness: Yes, sir.

Judge Windham: Now, in that contest in which you were a candidate for an elector, you were elected in the general election as an elector, weren't you?

The Witness: Yes, sir.

Judge Windham: And that is the occasion thereafter when you say you voted for Thurmond and for his running mate?

The Witness: That is right.

Judge Windham: Now, in making your race for a nominee as an elector in the May primary of that year, did you have any platform upon which you ran and which you specifically espoused and let it be known by your cards and your newspaper advertisements and otherwise?

The Witness: Yes, sir.

[fol. 60] Judge Windham: In short, what was it?

The Witness: That I wouldn't vote for Mr. Truman if he was the nominee of the National Democratic Convention, or for any other candidate who specifically sponsored anti-South legislation. I am not sure it read exactly like that, but that is what it meant.

Judge Windham: Now, gentlemen, I would suppose that probably all of us unofficially knew that that was true of this gentleman, and the others who were elected with him as

electors, and the question I had in mind was this: Under what—the statement being used by the Committee this year, a copy of which is attached to this petition, under that statement and under the statute. I was wondering upon what basis it would be or could be held he is not eligible to vote in this primary.

This says here in paragraph 4, this statement by the Committee, that qualified electors of this State who believe in the principles of a Democratic Party, and who agree and bind themselves by participating in the primary to abide by the results of the primary and to aid and support the nominees of the Democratic Party therein.

Now, I am assuming this has to do with the present election, if a man wants to get into it, here is what he has got to have. He has got to bind himself to support the nominees therein, and the nominees of the National Convention of the Democratic Party for President and Vice President of the United States. That is what he has got to have to get in this coming election.

I understand that the Committee has formulated, and it is set forth either there or otherwise, or it shall be printed on the back, but with reference to his past actions, if he specifically ran on a committed platform in the Democratic primary, participated in it in 1948, and on that platform submitted to the people of the State, and approved by them he was elected, and if he, in that general election, voted the Democratic ticket and was elected on that platform, would it be your idea that if he ran on that platform before the voters of the State of Alabama in the primary election—the Democratic voters, ran on that platform and they approved him on that platform, then in the general election was elected and thereafter voted as he did and as he had [fol. 61] agreed to vote, is it your judgment that would make him in anywise ineligible to participate in another Democratic primary?

Mr. Mayfield: Judge, let me answer that question in this way: Mr. Ben Ray—let's get back to the strictly legal question involved. Mr. Ben Ray is Chairman of the State Democratic Executive Committee, is appeared to order and show cause in this court why a writ of mandamus should not issue to him commanding him to certify to the Secre-

tary of State in less than 40 days prior to the holding of the Democratic primary on May 6, 1952, the name of Edmund Blair as a candidate for nomination for Presidential and Vice Presidential elector. The order of this court is not to strike down a pledge or a part of a pledge.

Mr. Ray is here ordered to pass on all of Mr. Blair's qualifications, sign them in the affirmative and so fortify to the Secretary of State.

Now, Section 345 of the Code of Alabama, Title 17, provides that one of the qualifications for a candidate for office is that he shall be eligible to vote in the Democratic primary.

Now, Mr. Ray has to determine, among other qualifications, whether or not he is qualified to vote in the Democratic primary under Section 345, and——

Judge Windham: I think so, yes, sir.

Mr. Mayfield: —and we hold that—we take the position that if he is not of the Democratic faith, that he has no right to be in the primary, and, therefore, we propose to examine him on his political faith at this time.

That is why the question was put to the witness.

Judge McElroy: Let me ask you gentlemen this: Would it be a ground for challenging a man who offers to vote in the Democratic primary to be held next May that he did not believe in principles of the Democratic Party, and, if so, where is the statute on that?

Judge Wilkinson: The very converse of it is true.

Judge McElroy: I am trying to find out where does the statute allow for that in the primary election under the laws [fol. 62] of Alabama the right to deny a person the right to vote, or challenge his right to vote in that primary on the ground he doesn't believe what we might call the basic principles of the Party who is having the primary.

Mr. Mayfield: I might answer that by saying this; that the Legislature of Alabama has given the State Democratic Executive Committee of Alabama authority to establish the qualifications of the voters and candidates, and Rule 12 of that Committee provides that they shall be the sole judge of party fealty.

Judge McElroy: You are still talking about their right to vote?

Mr. Mayfield: Yes, sir, but the right to vote is an intricate part of his qualification as a candidate.

Judge McElroy: I readily grant his right to vote is necessarily a part of his qualification.

We want to go back to that question suppose he went up to the polls in the primary in May and offered to vote, and they said, we are not going to let you vote; you are not a Democrat; you are a Republican, you can't vote.

Now, somebody says I challenge him on that ground. Is that a good ground; what does it do; is he entitled to vote.

Mr. Mayfield: I might state this, that the Supreme Court of the State of Alabama had formerly upheld the requirement requiring a voter, back in the Comer days, a voter to take an oath at the polls that he supported the nominees of the Democratic Party in the last election as a prerequisite to voting.

Now, the matter doesn't go that far today. However, the State Democratic Executive Committee is the sole judge of party fealty, and Mr. Ray is being sued, not as Mr. Ben Ray, attorney, of Birmingham, but as Mr. Ben Ray, Chairman of the Democratic Executive Committee of Alabama, as chief executive and judicial officer, and we say he has the unqualified right, subject to the review of no courts, to determine whether or not a man is or is not a member of the Democratic Party in Alabama, in that his review, if he has one, is not to the court, but to the Committee as a whole as provided by the rules and regulations of the Committee.

[fol. 63] Mr. Cook: If the court pleases, I want to say this: I don't think the Legislature pre-empted or exhausted the field when it enacted the primary law.

The Supreme Court said in Lett versus Davis, in some sense, the court left the power to the Committee, for instance, the power to establish the political qualifications of the candidates, left it where it had always been, with the Committee, and they have not pre-empted the entire field.

Judge McElroy: What I want to know is where is the law. I guess there is somewhere the law that says that the State Democratic Committee has the right to fix the qualifications of a person who will vote in the primary.

Mr. Wilkinson: There isn't any such law at all.

Mr. Cook: It says that the following persons shall be entitled to vote in the primary election and no other.

Judge McElroy: Where is the statute?

Mr. Cook: The Supreme Court has passed on it.

Mr. Wilkinson: The statute is exclusive on it.

Section 347: "All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballots of that political party, and no other."

That is the Section on who may vote in the primary.

Judge McElroy: That makes the same requirement.

Mr. Wilkinson: Let's go a little further, Section 355, who can challenge, and on what ground a voter may be challenged in a primary.

"If the name of a person desiring to vote does not appear on the official list of voters for said district, warrant or precinct, as furnished by the Judge of Probate, it shall be the duty of the inspectors to challenge such vote in the same manner as they are required to challenge voters in general elections whose names do not appear on the official list of voters, and, when challenged, such voter, before his ballot shall be received, [fol. 64] shall be required to swear and subscribe to the same affidavit of qualification which is required of a voter challenged at a general election, and shall also be required to produce the same kind of affidavit of identification as is required of a voter challenged at a general election, and the affidavit of identification must be subscribed and sworn to in like manner as required in general elections; provided, however, that wherever a person duly qualifies in a district, warrant or precinct, presents to the inspectors a certificate, (dated subsequently to the date of publication by the Probate Judge of the list of qualified voters,) signed by the Probate Judge, and under his seal or that of his court, that such person named appears upon the list of qualified electors, entitled to vote at that primary, on file or record in his office, then such applicant may be allowed to vote without any challenge made upon the above ground."

There is no provision in here for challenging a man because he doesn't agree with certain principles. The grounds of challenge are set out in the statute itself.

Mr. Cook: He overlooks the fact that the pledge on the ballot is the greatest of all. The ballot—the pledge on the ballot is prescribed by the statute. He hasn't read all of Section 347.

Judge McElroy: The pledge on the ballot doesn't say anything about believing in the principles of the Democratic party. It says by voting he is voting for the nominees of this party in the general election.

Mr. Madison: As a part of this resolution which is attached to this petition, the pledge is one part of it, and there are two other parts of this resolution, two separate parts. It says the following persons shall be entitled to vote in said primary election and none other, namely, qualified electors in this State who believe in the principles of the Democratic Party.

Now, your Honor has asked Mr. Mayfield for his definition on democracy and the principles of the Democratic Party. There used to be an old statement that out of the [fol. 65] facts the law arises, and you have got to get the facts from this man to determine what he is, and it is your duty, not ours, to say whether he is a Democrat, and whether or not he believed in the principles of the Democratic Party.

Mr. Cook: If the court pleases——

Mr. Wilkinson: I don't concede that at all. I don't think it is this court's duty, and I don't think it is Ben Ray's duty. The man has filed the affidavit required by law.

Mr. Cook: He didn't read all of Section 347. It says further:

> "But every State Executive Committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election."

There it is in black and white, and that is what they have decided to do here.

Mr. Wilkinson: Do you claim that is worth the paper it is written on?

Mr. Cook: Mr. Ray is bound by this statute.

Mr. Wilkinson: It has been reputed in the South Carolina case.

Mr. Cook: That is what you didn't read just now.

Judge McElroy: Judge, it is quite clear in the South Carolina case they couldn't make a qualification that deprived a man of the right to vote on account of color, but otherwise——

Mr. Wilkinson: By the same parity of reasoning, you can't exclude a taxpayer from the primary who agrees to support the nominees of the primary, and to say he can be taxed to support and not participate in it.

Mr. Mayfield: You can exclude a Baptist from the Methodist Church, Judge.

Mr. Wilkinson: I don't know about that. The Baptist doesn't support the Methodist Church.

Judge Windham: I don't think the South Carolina case dealt with this situation.

Mr. Wilkinson: The South Carolina case deals with the [fol. 66] proposition that you can't exclude a man for unconstitutional reasons from a primary, whether he is a taxpayer, Negro, or what he is.

Mr. Mayfield: We are here faced with a situation of a man who is demanding political preferment at the hands of the Democratic Party of Alabama, and we state he doesn't have the political qualifications to be a member, and we offer to show that.

Mr. Wilkinson: If he doesn't have the qualifications to participate in the Democratic primary Lister Hill hasn't got them, John Sparkman hasn't got them, and the members of this court hasn't got them, or anybody in Alabama.

Mr. Madison: That can be brought out by his testimony.

Judge Windham: The last question, please, Mr. Reporter.

(Whereupon, the Reporter read the question last propounded as follows:

"Yes, sir. Did you subscribe to that pledge at the time you cast your vote, or did you have some mental reservations.")

Judge McElroy: Judge, I think perhaps ruling on the objection is going to take longer than bringing out the evi-

dence. I think maybe we had better let the evidence come out with the right to cut it off if it looks like it is going to go into another field.

Mr. Wilkinson: Go ahead. I will withdraw the objection.

Judge Windham: You may answer, the pledge, back in 1948, whether you subscribed to it, or whether you had mental reservations.

A. I had no mental reservations regarding the pledge, no.

Q. Did you take part in the so-called Dixiecratic Rump Convention here in Birmingham in 1948?

A. If you are referring to the Convention of the Alabama Democrats at the City Auditorium, yes, sir.

Q. Did you subscribe to the political belief they enunciated there?

A. I am not sure that I know exactly what you mean. I don't know that I could sit down and write or remember the political beliefs they enunciated there.

Q. Did you endorse the platform and resolutions that were adopted by the Dixiecrat Convention here in Birmingham?

[fol. 67] A. Do you mean, by calling it Dixiecrat, are you calling it that officially, or are you calling—speaking about the assembly of Alabama Democrats in Birmingham?

Q. I am using the common street terminology; we are speaking of the same thing.

A. I won't—I refuse to answer the question based on street terminology.

Q. Yes, sir. Do you object to the term Dixiecrat?

Mr. Wilkinson: What has that got to do with this, killing time about nothing.

Q. You have offered to qualify here as an elector, and you are seeking to force Mr. Ben Ray to qualify you as an elector—as a candidate in the Democratic primary as an elector. If you were elected to this office, do you intend to cast your electoral ballot?

Mr. Wilkinson: We object to that because it deals with a future proposition, and he can't be required to do that under the constitution.

Judge McElroy: Overrule the objection.

Mr. Wilkinson: We except.

A. I don't know at this time.

Q. Would you consider casting your electoral ballot, if you are nominated and elected, for the Republican presidential candidate?

A. No, sir.

Q. You wouldn't, under any circumstances, cast your electoral ballot, if you were nominated and elected, for the Republican candidate for President, be he General Eisenhower or anyone else?

A. I think that is a question, if the judges permit, that it is possible that the candidate for electors, who decline—who declare themselves against President Truman, might be elected electors by the Republican Party.

Q. Let me ask you this question——

A. I won't say that.

Q. You won't say you won't take your electoral vote where you have nominated at the hands of the Democratic Party and deliver it to the Republican candidate for President?

A. With reservations, yes, sir, I will say that.

[fol. 68] What are your reservations?

A. I don't know; that would have to be seen as political events brought various things to bear.

Q. Now, you have stated in your oath that you will not cast your electoral ballot for a person, even though nominated in the Democratic Convention, who is opposed to certain things that you are opposed to, haven't you?

A. I don't quite follow you.

Judge Windham: Opposed to certain things he is opposed to?

Q. Who approve of certain things you disapprove.

Mr. Wilkinson: He said in his affidavit he wouldn't vote for anybody who——

Mr. Mayfield: How about letting the witness testify.

A. I didn't get the question.

Q. You state in your affidavit there are circumstances under which you will not cast your electoral ballot for the nominee of the Democratic Convention, are there not?

A. Yes, sir.

Q. All right. Assume that if you are elected an elector you mean to carry out the function of that office and vote for somebody for President, don't you?

A. Yes, sir.

Q. Now, if you are opposed to the Democratic nominee, whoever he may be, what do you intend to do with your electoral vote?

A. I don't know yet. I have already told you that.

Q. If you are opposed to the nominee of the Democratic party, you still intend to cast that ballot, do you not?

A. I don't know yet.

Q. You are not going to refuse to carry out the terms of your office and vote for nobody for President, are you?

A. I don't know.

Q. In other words, your position is, and you admit that if there is no candidate satisfactory for President, you are just going fishing on that day?

[fol. 69] A. I don't know about that.

Q. You just don't know?

A. I don't know about that.

Q. But you are not willing to state emphatically that you will carry out your duties as an elector if you are elected?

A. I don't know about that either.

Q. You won't give us a yes or no answer on that?

A. No, sir.

Q. You won't state definitely you will vote for anyone for President if you are elected an elector?

A. No, sir.

Q. Do we have it to be your testimony that you don't know if you are elected whether you will cast an electoral vote at all; is that your testimony?

A. I didn't say that. I said I did not know.

Q. But you do not state under oath that you will vote for anyone; is that correct?

A. I said I didn't know.

Q. Then you are not prepared at this time to discharge the—your office as an elector if you are nominated and elected unqualifiedly; is that correct?

A. Nobody could say that they were prepared at this time because there is no nominees.

Q. Therefore, you are running for an office with a mental

reservation as to whether or not you will carry out the duties of that office; is that correct?

A. I don't know whether that is correct or not.

Q. I believe the question is perfectly clear, Mr. Blair, as to whether or not you intend to vote for someone as President if you are nominated and elected an elector.

A. I said I didn't know now.

Q. And you won't state to the court whether you will or will not vote?

A. No, sir.

Q. And in the event you do not vote, you will entirely ab-
[fol. 70] stain from voting for anyone; is that your position?

A. I didn't say that. I said I didn't know.

Q. Let me ask you if General Eisenhower is the nominee of the Republican Party, would you consider voting for General Eisenhower as President of the United States as the nominee of the Republican Party?

A. I don't know.

Q. Do you know of any man you would vote for as President of the United States as nominee of the Republican Party?

A. How is that?

Q. Do you know of any individual at present on the American scene you would vote for if he were the candidate of the Republican Party in the general election?

A. I do not.

Q. You do not?

A. That is right.

Q. In other words, your mind is not made up at the present whether you will or will not vote for anyone; is that correct?

A. Well, I wouldn't say that. I would say I have an open mind regarding that.

I would say that I am saying in my petition that I will not vote for Mr. Truman or anybody Mr. Truman selected.

Q. Will you say under a given set of circumstances you would refuse to vote for any candidate?

A. No; I won't say that.

Q. Will you say that under that same set of circumstances you will definitely cast your ballot for some candidate?

A. No; I won't say that.

Q. In other words, your mind is not made up whether or not if you were elected as an elector you will vote or will not vote; is that correct?

A. I just told you that will be based by coming events.

Q. If those coming events shape up contrary to your political belief you don't intend to vote at all; is that correct?

A. I didn't say that.

Q. Do you intend to vote?

[fol. 71] A. I don't know.

Q. What are the coming events you have in mind when you qualify your answer?

A. How was that?

Q. What are the—you said your decision would be based by coming events. What are those coming events?

A. I don't pretend to be a seer. I don't predict coming events.

Q. But you are not stating definitely to this court if elected you will cast your electoral ballot for some person for President of the United States?

A. The only thing I can say to the court is what has been said in my petition, that I won't vote for President Truman if he is the nominee of the Democratic National Convention, or anybody he selects, or anybody who carries a platform or sponsors and endorses an anti-Southern platform. That is the end of my statement regarding that.

Q. Let's assume for the purpose of argument that President Truman were nominated. Who would you vote for for President?

A. I don't know. I think there would be another candidate.

Q. Who do you think would be such a candidate?

A. I have no idea.

Q. Did you vote for Admiral Crommlin when he was a candidate against Senator Hill?

A. I did not.

Q. Let me ask you this: Did you vote for Senator Hill in that election?

A. I certainly did. I voted a straight Democrat ticket. If his name was on the ballot, I did, as much as I hated to.

Q. Did you aid or support, directly or indirectly, any candidates other than nominees of the Democrat Party?

A. What election are you speaking of?

Q. 1950.

A. Aid or support in what way?

Q. By your newspaper, by your contacts, by any public speeches or urging your friends.

A. No, sir.

[fol. 72] Q. As you ordinarily——

A. No, sir.

Q. —support a candidate?

A. I would like to amend that by saying I have never written anything complimentary about Senator Hill, and if you call that aiding and support for Mr. Crommlin, it was, but as far as endorsing Mr. Crommlin, or asking any of my friends to vote for him, or not vote a straight Democrat ticket, I didn't.

Q. At the time you were writing these uncomplimentary things about Senator Hill, which I admit is a man's rights, was he or was he not then a nominee of the Democrat Party?

A. Mr. Mayfield, I have never written anything complimentary about Senator Hill since I have been publishing newspapers for 14 years.

Q. Mr. Blair, let me ask you this: Have you made up your mind—I will ask you this question first: Did you write or say anything complimentary about Admiral Crommlin in your newspaper during the compaign?

A. I frankly don't remember.

Q. You don't remember?

A. No, sir; I don't. If I did, it was very little, if any, because I didn't know Admiral Crommlin. I didn't know anything about what he stood for. I knew he didn't have a chance in the world of defeating Senator Hill in the general election in Alabama, and I took very little, if any, part in it at all.

I might add at that time I was publicity director for Judge Boozer, and after the primary was over I went back to making a living and took very little, if any, part in politics.

Q. When did you make your demand on Mr. Ben Ray to certify you as a candidate in the coming Democratic primary for this position of Presidential Elector?

A. When did I?

Q. Yes, sir.

A. I don't know; it was one day the first part of last week.

Q. Search your recollection.

A. I talked to Judge Wilkinson about it over the tele-
[fol. 73] phone, and I am not positive whether it was Monday or Tuesday of last week. I just don't know.

Q. You have sworn to the facts as set out in this petition, haven't you?

A. Yes, sir.

Q. And they are true and correct according to your information and belief, aren't they?

A. That is right.

Q. I assume you instructed Judge Wilkinson to write this letter to Mr. Ben Ray which you set up in your petition under date of January 30, 1952?

A. Would you mind reading the letter?

Q. You swore to the petition; your memory seems to be rather faulty?

A. That is right; I just wanted to see if you had what I was thinking about, Mr. Mayfield.

Q. This letter was written by Judge Wilkinson in his capacity as your attorney, was it not?

A. That is right.

Q. And that letter was dated on the 30th day of January, 1952; is that correct?

A. I don't remember the date. If that is what it is there, that is correct.

Q. And also this letter of 30 January, 1952, which is set up in the original petition, here, I will show you this letter?

A. (Counsel hands paper to witness.)
That is right.

Q. Did you instruct Judge Wilkinson to write that letter for you, or approve the final draft of it?

A. That is right.

Q. I will ask you whether or not you approved this language:

> "You are accordingly notified that we are preparing a petition for mandamus which will be filed during the day unless you advise us that you will agree to certify Mr. Blair's candidacy to the Secretary of State within the time required by law"?

[fol. 74] A. That is right.

Q. Now, you did file you- petition for mandamus on the same day you made demand on Mr. Ray to certify you, didn't you?

A. Through Mr. Wilkinson, yes, sir.

Q. And you had a fixed purpose in your mind to file this petition for mandamus at the time you made demand on Mr. Ray to certify, did you not?

A. I certainly did.

Q. So your attempting to have Mr. Ray certify you was nothing more than actually in laying a predicate to the bringing or seeking of your mandamus, is it not, Mr. Blair, in truth and in fact?

A. No; it wasn't that altogether. It had more than one purpose, Mr. Mayfield. If the judges will hear me, I will say why.

Judge McElroy: Go ahead.

The Witness: I filed the petition to become a candidate for elector because I wanted the people of Alabama not to have the door closed in their face. I wanted the people of Alabama to have a slate of electors who said they were anti-Truman, and a slate who said they were for Truman, and if the pro-Truman electors won, as a voter, I would vote for the nominee of the National Democratic Convention. If the anti-Truman set of electors won, of course, we would vote, as I said, coming events would dictate.

The mandamus—we felt Mr. Ray, in view of the high-handed and dictatorial action of the Democratic Executive Committee——

Mr. Mayfield: We move to strike that as not being responsive to any question.

The Witness: They told me I could answer in my own way. You asked me why and I am telling you.

Mr. Mayfield: We move the court to strike that.

Judge Windham: Let's see, now, the question was about his purpose. I move to overrule the objection.

Judge McElroy: Overrule the objection.

Judge Windham: Go ahead, continue with your statement.

The Witness: As I said, I wanted the people of Alabama [fol. 75] to have a chance to express their views as being

for or against Mr. Truman. That was the purpose of becoming an elector.

Judge McElroy: Getting back to the question Mr. Mayfield asked him——

The Witness: I assume from that question he meant as a predicate the mandamus was the whole thing. It was not. I wanted to become a candidate, and I do want to become a candidate for elector. The mandamus was because we knew in view of the ruling of the Democratic Executive Committee they would either refuse or pigeonhole my application.

Q. At the time you filed your application for candidacy, did you have in mind at any time allowing Mr. Ray to rule on your application before you filed your writ of mandamus?

A. I am not a lawyer.

Mr. Wilkinson: I don't object to any legitimate question, but going out as far afield as that——

Judge McElroy: I am inclined to sustain the objection to that, Judge Windham, as to whether or not—read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Mayfield: It is a question of whether or not the writ is brought in good faith.

Judge McElroy: I will vote to withdraw my ruling and let him answer.

Judge Windham: Let him answer.

Mr. Mayfield: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. Mr. Mayfield, the deadline for qualifying is March 1. I knew that the court procedure——

Mr. Mayfield: We object to that answer as not being responsive to the question and ask the court to exclude it.

The court takes judicial knowledge as to what the law is.

The Witness: I don't know anything about the law.

[fol. 76] Judge McElroy: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. Did I have in mind at any time allowing Mr. Ray to decide?

Q. Yes.

A. I had always understood if you made application to the Chairman of the Democratic Executive Committee, always in the past he automatically passed it on to the Secretary of State, wherever it goes, and I didn't think he was going to do that.

Q. You don't consider then that Mr. Ray had the right to determine your qualifications to become a candidate in the Democratic primary as a Presidential Elector?

A. I believe I am qualified, Mr. Mayfield, and over a hundred thousand Alabamians believed that in '48.

Mr. Mayfield: We move to strike that and ask the witness not to make a political speech every time he answers a question.

The Witness: I am not making a political speech.

Judge Windham: We will sustain the objection and exclude the last answer.

Judge McElroy: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Wilkinson: I object.

Judge McElroy: I think the objection should be sustained. As to what he felt one way or the other wouldn't have anything to do with whether he had the right or didn't have the right.

Judge Windham: There was no objection to the original question.

Q. When you instructed your attorney, at what time of day on January 30 did you instruct and authorize your attorney to file your writ of mandamus for you?

A. I honestly don't remember, Mr. Mayfield, whether it was in the afternoon or before noon. It seems it was in the afternoon.

Q. Do you know what time?

A. If you will let me change that I believe it was the fore-
[fol. 77] noon, and I told Judge Wilkinson I would be in his office that afternoon. I believe that is right.

Q. So on the morning of January 30, 1952, you instructed your attorney to bring a writ of mandamus against Mr. Ray?

A. Whatever date that was, yes, sir.

Q. And it was on that morning?

A. I am sure that is right, if that is the right date.

Q. And it was also on the morning of January 30, that you instructed your attorney to write to Mr. Ben Ray and tell him that if he didn't approve your candidacy you were going to file your write of mandamus; is that correct?

A. The whole thing was talked about.

Q. Isn't it a fact, and isn't it true, Mr. Blair, that what you actually did was to instruct your attorney to write this letter and file this writ of mandamus at approximately the same time, all on the morning of January 30; isn't that a true statement?

A. Mr. Mayfield, it wasn't like that, but we talked about the entire matter, and I told him what I wanted him to do, and asked him to ask as my attorney, and left the rest of it to his discretion and his knowledge of what he was doing.

Q. You at no time waited for an answer, or did not expect an answer from your letter of January 30, or expect a reply from Mr. Ben Ray before you actually filed this write of mandamus, did you?

A. Did I expect a reply?

Q. Yes, sir.

A. No, sir; I didn't expect any reply.

Q. And so this letter you wrote him here, and which you have set out in your sworn petition, was window dressing to lay a condition precedent to filing your writ of mandamus?

Mr. Wilkinson: We object to that, if the court pleases, whether it was window dressing or not.

Mr. Mayfield: I might state that this whole line of questioning is directed to show that this writ of mandamus was not brought in good faith.

[fol. 78] Judge McElroy: I am inclined to sustain the ob-

jection to the last question if it is a question of whether Mr. Ray has had time or is entitled to time.

Mr. Mayfield: That is exactly what we——

Judge McElroy: I think what he is—that that would not be determined by his belief about the matter.

Judge Windham: I agree with you.

Mr. Mayfield: We are attempting to offer to show that after writing this letter he instructed his attorney to bring and maintain this writ of mandamus without giving the Chairman of the State Democratic Executive Committee a reasonable time to answer a letter or determine his qualifications.

Judge McElroy: We sustain the objection to the last question.

Mr. Mayfield: We respectfully except.

Q. Now, Mr. Blair, have you—do you intend, should Mr. Ray's decision be contrary to your candidacy, or against your candidacy, do you intend to take an appeal to the State Democratic Executive Committee?

Mr. Wilkinson: We object to that; incompetent, irrelevant, immaterial, and illegal; has no bearing on the issues in this case.

Judge Windham: If Mr. Ray's decision—what do you mean appealing to the State Democratic Executive Committee; is that what you mean?

Mr. Mayfield: Yes, sir.

Judge McElroy: I am inclined to think that would be immaterial under the situation we have here.

Judge Windham: I think so, because you raise the point here that the legal procedure would have been to do that, and that this case here was inappropriately filed until that had been done.

Mr. Mayfield: Yes, sir.

Judge Windham: So he has already submitted the matter to the court, and I would be inclined to agree to sustain.

Judge McElroy: I think it is quite obvious he has come to the court and not the Executive Committee. That is very plain.

Judge Windham: He has already cast his course.

Mr. Madison: One exception will cover your ruling.

[fol. 79] Judge McElroy: Yes, sir.

Mr. Madison: We except.

Mr. Mayfield: We respectfully except to your Honor's ruling on the last question, and I assume from your Honor's ruling if I assume correctly, that your Honors will not allow us to pursue that line of questioning any further; is that correct?

Judge McElroy: As to his intention or the lack of his intention to appeal from any ruling Mr. Ray may make to the whole of the State Democratic Executive Committee, we think—I think, it would be my judgment, that further inquiry—that that inquiry is immaterial.

Judge Windham: That is my judgment. I think he has already cast his course and come to the court.

Judge McElroy: That either is a ground for not coming before this court or it is a ground.

Mr. Mayfield: We respectfully except.

Q. Now, Mr. Blair, are you willing to vote a ballot in the 1952 Democratic primary containing the pledge set out in the resolution of the Democratic Committee adopted on January 26, 1952——

Mr. Wilkinson: We object to that, if you Honor pleases, incompetent, irrelevant, and immaterial; has nothing to do with the issues in this case.

Q. —which pledge is as follows:

> "By casting this ballot I do pledge myself to abide by the results of this primary election and to aid and support all the nominees thereof in the ensuing general elections. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."

Mr. Wilkinson: On the further and additional ground on his declaration of candidacy, the witness has stated under oath he will not vote for Truman or anybody who supports the Truman-Humphrey Civil Rights Program.

Mr. Mayfield: We are not asking him how he will cast his ballot.

Judge Windham: I think it is in order that we all have a [fol. 80] few minutes intermission.

(Whereupon, proceedings were in recess from 10:55 a. m. until 11:10 a. m., at which time, proceedings were resumed as follows:)

Mr. Wilkinson: Let me assign an additional ground of objection to the last question.

Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Wilkinson: On the further and additional ground that so much of the pledge purports to pledge the voter to support the nominees of the National Democratic Convention is unauthorized, illegal and void because it is in violation of Section 352, Title 17 of the Alabama Code of 1940 which says what shall be printed on the ballot, and the attempted pledge of the Committee, or the purported pledge of the Committee, that is, so much of that pledge purports to pledge the voter to support the nominees of the National Democratic Party involves an additional obligation on the voter not imposed on him by the Code.

Judge Windham: Gentlemen, we sustain the objection, and I would like to point out in connection with it that the statute, Section 347 of Title 17, speaking on the subject that we now have under consideration says:

> "All persons who are qualified electors," and so forth.

In other words, it appears to deal with the question of whether a man is a qualified elector. I don't think it deals with the question of—I believe in this matter we have the question of whether or not he is qualified as an elector in that election under another Section here.

What is the number of that other Section as to candidates in the Democratic primary?

Mr. Cook: 345.

Judge Windham: Let me look at that for a moment.

Mr. Cook: That is eligible instead of qualified.

Judge Windham: "And unless he is eligible to vote in [fol. 81] the primary election."

Whether you look at the one or whether you look at the other, it doesn't deal with the question of whether or not

he is willing to vote, or whether or not he is going to vote. The one Section deals with the question of whether or not he is eligible to vote, and the other as to whether or not he is a qualified elector, so we will sustain the objection, gentlemen.

Mr. Mayfield: We respectfully except.

Edmund Blair, thereupon resumed the witness stand and testified further as follows:

Cross-examination—resumed.

By Mr. Mayfield:

Q. Now, Mr. Blair, where did you get this substitute pledge that you offered to take that is contained in your sworn petition?

A. I discussed it with Judge Wilkinson and we arrived at it.

Q. You and Judge Wilkinson discussed that pledge together?

A. Yes, sir.

Q. You realized at the time you discussed it it was not in conformity with the resolution adopted by the State Executive Democratic Committee adopted on January 26, 1952, did you not?

Mr. Wilkinson: We object to whether he realized it or not, It speaks for itself.

Judge Windham: I don't think it will be competent. We sustain the objection.

Mr. Mayfield: We respectfully except.

Q. Let me ask you this: Have you taken any steps or conferred with any people, or aided and abetted in any way forming a third party in Alabama whose candidate will go on the ballot, or will attempt to go on the ballot in the 1952 general election?

A. Have I taken any steps on it in any way?

Q. Yes.

A. No, sir.

Q. Do you intend to take any steps to aid anyone in the [fol. 82] formation of a third party in Alabama?

A. I am not going to answer that.

Mr. Wilkinson: Wait a minute. We object to that; what has that got to do with the issue before the court?

Mr. Mayfield: It is a question of his political qualifications, whether or not he is, in fact, a Democrat, or whether or not he is attempting to go into the Democratic primary for the pure and simple purpose of disrupting the orderly process of the Democratic Party of Alabama which is our contention set up in this answer.

Mr. Cook: Good faith and clean hands doctrine.

Judge McElroy: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Wilkinson: There is no evidence before the court that anybody contemplates a third party, intimated a third party or suggested a third party. It is nothing in the world but the wildest speculation.

Judge McElroy: I think I would vote to overrule.

Mr. Wilkinson: We except.

Judge McElroy: I would like for Judge Windham to speak.

Judge Windham: I will speak in a minute or confer with you, whichever I see fit to do.

Mr. Wilkinson: I will withdraw the objection. It takes more time to object than it does to answer the question.

Judge Windham: He has withdrawn his objection, and I believe your question in substance was whether he plans——

Mr. Mayfield: Whether he plans to aid in the formation of a third party in Alabama between the time of the primary and the general election; that is the substance of it.

Mr. Wilkinson: That assumes there is some effort to establish a third party.

Mr. Mayfield: Anyone that can read the newspapers knows that.

Judge Windham: The Judge has withdrawn his objection; you may answer.

Mr. Wilkinson: It will save time.

A. The whole idea of this thing is so that I can remain [fol. 83] and vote a Democratic ticket in good faith without having to vote, without being forced to vote for anybody. Any plans for a third party, I have none whatever.

Mr. Mayfield: We move to strike the first part of that answer as not being responsive to the question asked.

Judge Windham: The first part, I think, should be stricken, and the latter part in which he says he has no plans and so forth, I think should remain in.

Q. Mr. Blair, if your contention is determined contrary to your thoughts in the matter, and your wishes in the matter, would you or would you not aid in forming a third party in Alabama?

A. I will be guided by that when the time comes.

Q. You are not answering to the court what you will do; you refuse to answer that question?

A. I don't see how you can expect me to answer that question. I don't know what is going to happen.

Q. You must have given some consideration to the effect as to what you would do in the event that your papers were declined or refused on the basis that you refused to adopt the pledge?

A. If my application to become a candidate is not approved or is refused, what I will do subsequent to that time remains to be seen.

However, at present, my plans are to vote the Democratic ticket as I always have.

Judge Windham: Let me ask you on that: You say as you always have, have you always voted the Democratic ticket ever since you became a qualified voter?

The Witness: Yes, sir; I have never voted anything but a straight Democrat ticket in a general election.

Q. You did not vote the Democrat ticket when you were elected as an elector—nominated as an elector in the Democratic primary, you didn't cast your vote for a Democrat, did you?

A. If Governor Thurmond and Mr. Wright are not Democrats, I don't know what they are.

Q. But you did not cast your vote for the Democrat nominee, did you?

[fol. 84] A. I didn't make a pledge to do that.

Q. I didn't ask you that, just answer the question.

A. I did not.

Q. Do you know who you favor for President at this time?

A. I think that is my business, being an avowed candidate, or my application to become a candidate, I don't think you have a right for me to—to ask me to explain my political view.

Mr. Mayfield: Read the question to him.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. The same answer goes.

Q. Do you refuse to answer to the court who you favor for President at this time?

A. Do I refuse to answer?

Q. Yes.

A. I have answered the question.

Q. Do you refuse to state to the court who you favor for President at this time?

Mr. Wilkinson: We object to that; the court hasn't ordered him to state. Mr. Mayfield has asked the question and he claims his privilege.

Mr. Mayfield: At the time I made the statement you hadn't objected.

Mr. Wilkinson: I am not objecting to it.

Mr. Mayfield: Then the witness should answer the question.

Mr. Wilkinson: No, the witness won't. The witness has a right to claim his own privilege.

Judge Windham: I think it would be our duty to direct the witness answer the question if there be no objection to it.

If his answer is given in the form of an objection in lieu of his counsel making the objection, we would be happy to pass on it. I don't know whether that is an objection or not.

Mr. Wilkinson: Do you object to answering the question?

The Witness: I do object to being forced to name any man who at the present time I favor for the Presidency of the United States.

Judge Windham: I think it would be our duty to pass on [fol. 85] interposed as an objection.

Judge McElroy: I am inclined to think due to the questions we have dealt with before he should be requested to answer the question and I vote to overrule the objection.

Mr. Wilkinson: We except.

The Witness: Judge, I honestly don't know I can say I don't favor Mr. Truman. If I had a chance, I would vote for Governor Byrnes, Senator Byrd, or Senator Russell.

Q. Would you vote for General Eisenhower as opposed to Mr. Truman if he were the nominee of the Republican Party and Mr. Truman the nominee for the Democratic Party?

Mr. Wilkinson: We object to that because it assumes he is limited to those two people. He has the right to vote for anybody in the United States that he wants to, and the Legislature or anybody else cannot deny him that right.

Mr. Mayfield: We take issue with that statement of counsel.

Judge Windham: The question as put, I take it, would assume that he had no right to vote otherwise. If the witness understands that as an elector he can vote otherwise, I will overrule the objection and let him answer.

Judge McElroy: Overrule the objection.

A. What was the question?

Mr. Mayfield: Read the question.

(Whereupon the Reporter read the question propounded as last above recorded.)

A. I don't know.

Q. You don't know who you would vote for?

A. That is right; don't I have a right not to know?

Q. We believe you do know, Mr. Blair, and you are being evasive in your answer.

A. What you believe and what I don't know about is two different things.

Q. You refuse to take a choice between those two?

A. I certainly do at this time.

Q. You will not state you would not vote for General [fol. 86] Eisenhower in preference to Mr. Truman, do you?

A. Your Honor, do I have to answer questions that — leading?

Judge Windham: The fact that it is leading doesn't have anything to do with it because it is on cross-examination.

The Witness: I mean by that, Judge Windham, he is

putting—if I have any political ambitions, he is making me lay them on the block right here today.

Q. That is exactly what we are trying to do; we are trying to find out whether you are a Democrat or not.

Mr. Wilkinson: Are you a Democrat?

Judge Windham: Gentlemen, let's take that up in another case.

He has answered between those two he doesn't know, gentlemen, I suppose that is his answer.

Next question.

Q. Now, you state in your affidavit: "I will not cast an electoral vote for Harry S. Truman."

A. That is right.

Q. So that you know between those two that you would not vote for Truman, don't you; you have sworn you wouldn't?

A. Mr. Mayfield, there would be such a thing, if there was no candidate I could, in good conscience support, I could step aside, and the State Democratic Executive Committee, or whoever has the power, could appoint another elector in my place, and they could vote for anybody they wanted to.

Q. The State Democratic Committee doesn't have the power.

A. Whoever has the power.

Q. Nobody has that power. You would be holding in trust the votes which you had gotten in the election.

I want to know what you are going to do with those proxies.

Mr. Wilkinson: Let me correct counsel. He doesn't hold any proxy. The elector can fill any vacancy or the State Democratic Committee can fill any vacancy that occurs. Should he be nominated and resign, they would meet and certify a nominee in his place should he not show up at the electoral college. The statute provides the elector body fill [fol. 87] any vacancy.

Judge Windham: I think that is correct.

Q. In such a situation as I have put to you, would you consider not showing up at the electoral college?

Mr. Wilkinson: We object to what he would consider; asking a man to say what he would consider in November is highly speculative and incompetent, irrelevant, immaterial, and illegal.

Judge McElroy: Overrule.

Mr. Wilkinson: We except.

A. Would I consider what?

Q. Not showing up at the electoral college.

A. I think if I would resign I would have already made my position clear long before the electoral college met.

Q. You have stated that you will not state what you would do as between Eisenhower and Truman. Now, I am asking you whether you will do anything, whether you are going to face it and show up or resign?

A. If I was not going to cast my electoral vote for someone I would resign as before stated.

Q. Therefore, let me put it to you this way, that if the national nominee, the nominee of the National Democratic Convention is not satisfactory to you, that you will then resign?

Mr. Wilkinson: We object to that. He hasn't said that. It is incompetent, irrelevant, immaterial and illegal.

Judge Windham: He can say whether or not that is what he said.

A. I didn't say that.

Q. I am asking you if that is what you will do.

A. I don't know.

Q. What?

A. I don't know.

Q. Is there a possibility you will resign?

A. I don't know.

Q. Are you asking the voters of Alabama to speculate in the primary whether or not if you receive the nomination you will discharge the duties of the office?

[fol. 88] A. I certainly will.

Q. Now, let me ask you this: Are you willing to answer questions to Mr. Ben Ray or to the State Democratic Executive Committee as a whole concerning and touching your qualifications to vote in the 1952 Democratic primary?

Mr. Wilkinson: We object to that because there is no obligation on him to answer questions to Mr. Ray or the Committee; incompetent, irrelevant, immaterial, and illegal; he has appealed to the court for an adjudication of his rights, and is not required to go beyond the court.

Mr. Mayfield: It is the duty of the Chairman to examine and determine whether or not he is qualified to run in the primary.

Mr. Wilkinson: The Chairman of the State Democratic Committee has no more authority to determine his qualifications than I have. When he files a paper conforming to the law he is entitled to have his name on the ballot.

Judge McElroy: What is the Section of the Code?

Mr. Mayfield: 347.

Judge Windham: Are you questioning him as to whether or not at this time he is willing for Mr. Ray or the Committee as a whole to examine him?

Mr. Mayfield: Yes, sir, touching his qualifications.

Judge Windham: At this time?

Mr. Mayfield: Yes, sir, or at any other time.

Mr. Cook: We might amend that question so as to ascertain——

Judge Windham: Isn't that in effect looking towards some compromise of the case we have, namely, if he is willing to let them examine him and they go back and examine him and find he is all right, and then they come up and say we are willing to certify him, that ends the suit. Wouldn't that be in effect on that question since the case is already in court?

Mr. Mayfield: No, sir; he is asking for an extraordinary writ, and we are taking the position he did not submit himself to examination, or is not willing to submit himself to examination touching his qualifications, either to Mr. Ray [fol. 89] as the chief judicial executive officer of the State Executive Democratic Committee or the Committee as a whole. In other words, he is attempting in this lawsuit to completely shortcircuit the regular Democrat machinery as established by statute of Alabama.

Mr. Cook: Substituting the court for the Committee.

Judge Windham: Hasn't he already substituted the court for the Committee? What is the point in asking him whether

or not he is now willing to have Mr. Ray or the Committee examine him? Hasn't he already substituted the court for the Committee?

Mr. Cook: We want to test the good faith of the suit if the court pleases.

Mr. Wilkinson: There is no question about the good faith of the suit.

Mr. Mayfield: We take the position, and we so raised it by demurrer that there is.

Judge Windham: I understand that, but I don't think you need to prove he has substituted the court for the Committee;

Now, whether he can or not, is another question.

Mr. Mayfield: Well, if both judges have a fixed opinion on that, we won't pursue that line of inquiry any further.

Judge McElroy: I am inclined to think in the absence of any indication that Mr. Ray wanted to question him, we should treat that question as not before us.

I would vote to sustain the objection.

Mr. Mayfield: We except.

Q. Let me put it to you definitely that you are not willing to abide by the rules established by the State Democratic Executive Committee on January 6, 1952?

Mr. Wilkinson: We object to that; incompetent, irrelevant, immaterial and illegal; invades the province of the court; conclusion of the witness.

Judge McElroy: Sustain the objection to that question in its form.

[fol. 90] Judge Windham: I think they can—that this case and the paper he filed shows he is not willing to take the pledge he is required to according to the action of the Committee.

Mr. Cook: If the court pleases, in regard to this other question, I think you are entitled to all the light we can give you. One of the rules provide the Chairman is authorized to the candidacy of the candidate if he believes the affidavit to be untrue. He is under the duty to inquire into the matter of the contents of an affidavit to that end, and to that end, he should be allowed some sort of fair inquisition of the candidate.

Judge Windham: Isn't he getting a pretty fair inquisition of him right here?

Mr. Cook: Before he goes to court.

Judge Windham: You didn't ask him that question. You said are you willing for Mr. Ray to examine him, or the Committee?

Mr. Wilkinson: What part of the affidavit do you claim is untrue?

Mr. Cook: There is a good deal in there——

Mr. Mayfield: If the court pleases, I would like an opportunity for one minute to confer with my clients, and I think I have no further questions.

Judge Windham: Gentlemen, to make ourselves clear on that matter about the substitute, you gentlemen have raised the point in your pleadings it was an established procedure —Mr. Ray turned him down, and he did not follow that, but instead he came to the court. You don't have to prove that, because it is patent.

Judge McElroy: If that is a defense.

Mr. Madison: Will it be admitted in the record he did not do that?

Judge Windham: You are willing to admit that, aren't you, Mr. Wilkinson?

Mr. Wilkinson: Yes, sir; we will admit that he did not appeal to the Committee and does not have any intention of appealing to the Committee.

Judge McElroy: The court has heretofore decided that Mr. Ray, as Chairman of the State Democratic Committee is [fol. 91] an officer of the State of Alabama——

Mr. Mayfield: I would like for the Reporter to read to the witness the last statement made by his counsel.

Mr. Wilkinson: I object to him reading any statement of his counsel. I have stated what our position is and I will repeat it.

I haven't got any idea of appealing to this Committee on behalf of Mr. Blair.

Judge Windham: And did not appeal to them?

Mr. Wilkinson: Yes, sir.

Q. Do you concur in the statement made by Judge Wilkinson?

A. Certainly. If I didn't believe Mr. Wilkinson was a competent attorney I wouldn't have him representing me.

Q. We would be the first to admit that he is a competent attorney.

A. Do I object to his statement, was that your question?

Q. Do you concur in his statement?

A. I certainly do.

Mr. Mayfield: That is all.

Mr. Wilkinson: No further questions.

(Witness excused.)

Mr. Wilkinson: I would like to examine Mr. Ray.

BEN F. RAY, called as a witness, being duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wilkinson:

Q. Is this Mr. Ben F. Ray?

A. Yes, sir.

Q. Do you have the original of the letter of January 29, 1952, that I delivered to your office?

A. I think so. I pinned them together.

Q. Will you tell the court about the time of the afternoon of January 29, 1952, that I delivered that letter together with $10 to your office?

A. I didn't take any note of it. I think, though, it was after 2 o'clock.

Q. We probably agree it was between 2 and 3, don't we?

[fol. 92] A. I think I had already been to lunch.

Q. Would you say it was after 2 and before 3?

A. I would think it was perhaps between 2 and 3.

Mr. Wilkinson: We offer that letter in evidence, and I presume he wants to keep the original in the file, and it is agreeable with the court, I will substitute a carbon copy of it.

Mr. Mayfield: That letter is set up in the sworn pleadings.

Judge Windham: Just use the copy.

The Witness: That will be good.

Mr. Wilkinson: That will be Exhibit 3.

(Whereupon, a letter on the letterhead of Wilkinson & Skinner under date of January 29, 1952, signed by Horace C. Wilkinson, and addressed to Hon. Ben F. Ray, Chairman, State Democratic Executive Committee of Alabama, Birmingham, Alabama, was received in evidence and marked "Petitioner's Exhibit 3", and is in words and figures as follows:)

PETITIONER'S EXHIBIT 3

Wilkinson & Skinner

Lawyers

606-612 Farley Building

Birmingham 3, Alabama

January 29, 1952

Hon. Ben F. Ray, Chairman
State Democratic Executive Committee of Alabama
Birmingham, Alabama

My dear Mr. Ray:

I hand you herewith the declaration of candidacy of Edmund Blair for nomination as presidential and vice-presidential elector in the 1952 Alabama Democratic Primary.

I also hand you herewith ten dollars ($10.00) in United States currency to pay his assessment and qualifying fee.

I will greatly appreciate it if you will indicate your acceptance or rejection of this candidacy and the qualifying fee on my office copy of this letter so that I may have same for my file.

Yours very truly, Horace C. Wilkinson, Attorney for Edmund Blair.

HCW:K.
encl.

[fol. 93] Q. Following the delivery of that letter to you on January 29, 1952, did you send this letter of January 30, 1952, to my office the next morning?

A. The following day.

Q. And about what time of day if you recall?

A. I don't recall the hour. I think I have—however, that *that* letter there and your letter of the 30th may be based—I don't know—I am not accurate, I don't recall.

Q. Do you have my letter of the 30th of which this is a carbon?

A. Yes, sir; I got a letter the next morning. It came in with somebody. I don't know who it was.

Q. About 9 o'clock on the morning of the 30th?

A. Yes.

Q. Then you answered it sent that letter to my office on the 30th, didn't you?

A. Some time that day I sent the letter dated the 30th.

Mr. Wilkinson: We offer the letter of January 30 from Wilkinson to Ben F. Ray as Exhibit No. 4, and the letter of January 30 from Ray to Wilkinson as Exhibit No. 5.

(Whereupon, said letters were received in evidence and marked "Petitioner's Exhibit 4", and "Petitioner's Exhibit 5", and said letters are in words and figures as follows:)

PETITIONER'S EXHIBIT 4

January 30, 1952

Hon. Ben F. Ray, Chairman
State Democratic Committee of Alabama
Birmingham, Alabama

Dear Mr. Ray:

On yesterday, Mr. Edmund Blair filed with you his declaration of candidacy and also paid you ten dollars ($10.00) in United States currency to pay his assessment and qualifying fee. At that time you were requested to indicate your action on this declaration of candidacy, and you stated that you wanted some time to think it over.

In this morning's paper you are quoted as saying: "I am going to take my time on deciding whether Blair's

application should be accepted." We construe this as [fol. 94] an indication on your part that you will not perform your duty when the time arrives and there will not be sufficient time between your refusal and the primary to obtain relief in court if we wait until that time.

You are accordingly notified that we are preparing a Petition for Mandamus which will be filed during the day unless you advise us that you will agree to certify Mr. Blair's candidacy to the Secretary of State within the time required by law.

Yours very truly, Horace C. Wilkinson, Attorney for Edmund Blair.

HCW:K

PETITIONER'S EXHIBIT 5

State Democratic Executive Committee
Of Alabama

Ben F. Ray, Chairman
710 MASSEY BUILDING
Birmingham, Alabama

January 30, 1952

Hon. Horace C. Wilkinson
Attorney at Law
Farley Building
Birmingham, Alabama.

Dear Mr. Wilkinson:

Re: Edmund Blair

Shortly after the declaration of Mr. Edmund Blair was filed with me Tuesday afternoon, a reporter with the Birmingham Post-Herald called me for the purpose of verifying whether or not the declaration had been filed and expressed a desire to know what I expected to do with said declaration. I assumed that he acted on advance information and hence my reply quoted in the morning paper.

I am doing my best to serve the voters throughout the state and expect to pass on all matters presented to me to

the best of my ability and within the time required by law.

Yours very truly, /s/ Ben F. Ray, Chairman.

BFR:rc:

Q. Can you give us your best recollection as to the time Exhibit No. 5 left your office to be delivered to my office? [fol. 95] A. No, sir, because I handed it to one of the young ladies. I don't know which one took it. I think I left the office and came to the court house, and I made no note of the hour, but I did send it over.

Q. Now, Mr. Ray, I hand you a brief that was submitted in the Supreme Court of Alabama in the case of Wilkinson, Appellate, against the State Democratic Executive Committee and Ben F. Ray, Appellee, Sixth Division No. 366, filed on your behalf, and behalf of the State Democratic Executive Committee by Mr. Cook and Mr. Mayfield.

I will ask you to look at that brief and tell us whether you examined that brief prior to its submission to the court or conferred with counsel about its preparation?

A. We have had several discussions about the issues involved, and I have read most of it after it was printed.

Q. It is your best recollection is that a copy of the brief filed on your behalf and on behalf of the State Democratic Executive Committee?

A. I think so, on the 31st of January, I believe it was served on you.

Q. Yes, sir, by Mr. Cook. Is that correct?

A. I think so.

Mr. Wilkinson: We offer the brief in evidence as Petitioner's Exhibit No. 6.

Mr. Cook: If the court pleases, we object to that. The first objection I will make is it needlessly encumbers the record. We have 30 days at the most to go to Montgomery on an appeal, if an appeal is taken, and we all know a copying of that brief in the record will delay it. We object on the further ground it is incompetent, irrelevant, and immaterial; that the issues in this case are different from that case. That was a declaratory judgment proceeding. This is a mandamus proceeding; the parties are different, and we submit that a brief filed in that case would

not be binding on this Chairman and this Committee in this case.

Judge McElroy: Let me offer this thought in that connection: Gentlemen, suppose you agree that it be introduced in evidence, but that it not be incorporated in any transcript, and that the court—that this court and the Supreme Court both take judicial notice of that brief [fol. 96] so as to save any cost of copying.

Mr. Wilkinson: I was fixing to make this statement to the court: I am willing to stipulate that the brief may be omitted from the transcript and the transcript may recite that the brief introduced is a copy of the brief on file in the Supreme Court, and is part of this case Sixth Division No. 306, and the court may consult that brief in lieu of copying this.

Mr. Cook: We can't agee to it.

Judge Windham: Without waiving any other objection if it comes in.

Mr. Cook: We have a bunch of objections to the mandamus phase. This covers the electoral college phase here.

Judge Windham: I say if the brief is admitted, and without waiving your other objections to it, would it be agreeable, if it is admitted, and your objections all the way through are overruled, that it be handled in the fashion that has been suggested here.

Mr. Cook: Yes, sir.

Judge Windham: That neither side be required to put it in the transcript, but both this court and the Supreme Court take judicial notice of it, and the Supreme Court can look at the original that is filed down there.

We are not passing on any objections; we are trying to get that matter settled, probably with profit to both sides.

Mr. Mayfield: We can so stipulate that direct question asked by Judge Windham. We are willing to enter into that agreement and stipulate. However, at the present time, Judge Wilkinson has offered it as evidence, and we request the court's permission to examine Mr. Ray on voir dire prior to the court's ruling on the admissibility of the brief.

Judge Windham: I think that is a reasonable request.

Voir dire examination.

By Mr. Mayfield:

Q. Mr. Ray, did you take any actual part in the preparation of this brief?

A. No, sir.

Q. Is your name anywhere signed to this brief?

[fol. 97] A. No, sir.

Q. Did you take any part in the preparation of the statement of facts?

A. No, sir.

Q. In this brief?

A. No, sir.

Q. Have you at any time ever even read all of this brief?

A. No; I haven't read it completely.

Q. Your elaboration on this brief, Mr. Ray, amounted, actually, only to advising with counsel on certain phases of the issues that had been adjudicated before the Circuit Court; is that right?

A. That is right.

Mr. Mayfield: We respectfully object to the offer of the exhibit.

By Mr. Wilkinson:

Q. Mr. Mayfield and Mr. Cook are your counsel in the Supreme Court, are they not?

A. Yes; they have been appearing.

Q. Is there anything in this brief you disagree with or you desire to refute or you desire to withdraw?

A. No; that brief, I think, is a good one.

Judge McElroy: I will vote to overrule.

Judge Windham: I vote to overrule.

Mr. Mayfield: We respectfully except.

(Whereupon, said brief was received in evidence and marked "Petitioner's Exhibit 6", and pursuant to the foregoing agreement of counsel does not appear herein.)

Q. Mr. Ray, did you participate in a radio panel in the City of Montgomery where you and Tom Abernathy and

the representative of the Republican Party endorsed in a joint debate or some comment of the political situation in Alabama?

Mr. Cook: We object to that; he hasn't fixed a date.

Mr. Wilkinson: I am asking him; don't try to crowd me.

Judge McElroy: I would overrule the objection.

Judge Windham: I will overrule.

A. I appeared, I believe on the 18th day, Friday night, the 18th day down there at what was known and called the Alabama Press Association.

[fol. 98] Q. Alabama Press Association?

A. I think so.

Mr. Cook: If the court pleases, since he has fixed a date as prior to the date this resolution was adopted, on which this whole matter was founded, we object to that if he is offering that in proof of the averments of the petition.

That was a special meeting before any action was taken.

Judge McElroy: I will vote to overrule.

Judge Windham: I will overrule the objection. I think there are other parts in here that probably have to do with that same question.

Mr. Mayfield: We except.

Q. What was the substance and general tenor of your remarks on that occasion with respect to this primary or the prospective primary to be held in May, of this year?

Mr. Cook: If the court pleases, may we have a similar line of objection?

Judge McElroy: I would vote, in the interest of saving time on questions directed to Mr. Ray and concerning his speech at the Alabama Press Association, his remarks, that you have an objection on the grounds heretofore made, and any other additional ground and adverse ruling and exception in favor of the Respondents in the case.

Judge Windham: I state further I don't think it is necessary to restate them.

Q. As to being for Democrats or just for anybody?

A. Well, I don't recall the statements. Part of the statement was prepared in writing, and I don't believe they discuss the primary matter at all.

Q. Wasn't there a statement made on this—on that occasion that this primary will determine whether it is a Democratic primary or a primary for Democrats or anybody?

A. If I didn't make it, I would certainly reiterate that now. It is a Democratic primary. It is not for the Republicans or Socialists or Eisenhower crowd.

Q. That was your position at that time?

[fol. 99] A. Yes, sir, but that was not while——

Q. That was your position at that time and is now?

A. And is now.

Q. You haven't modified it in any particular?

A. Not a bit in the world. There is a Section that starts at 336 and goes through 400 and some odd, and it is quite an elaborate primary.

Q. What is your conception of a Democrat?

A. I can give you that pretty shortly.

Q. All right.

A. In my platform that I ran on and made speeches on the radio and otherwise, I used this language: A Democrat will support the nominees of the Party. I am a Democrat.

Q. Then it is your conception of a Democrat and your definition of a Democrat there would be your holding if you were called on to pass on the matter that one who would not agree to support a nominee of the National Democrat Convention was not a Democrat?

Mr. Mayfield: We object; he has four questions bundled into one, and an answer that might be responsive to one might be misleading as his answer to the other.

Judge Windham: Read that.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. Yes; that is fundamentally true.

Q. So that if Mr. Blair was given a hearing before you and stated frankly to you he would not vote for Truman or anybody supporting the Truman Civil Rights Program, if they were the nominees of the National Democrat Convention, you would rule he was not a Democrat and ineligible to participate in the primary, wouldn't you?

Mr. Cook: We object to that as covering only part of the qualifications on which a voter or a candidate would be examined. In other words, to say he is obliged to examine him, or whether or not he is willing to take the pledge on the ballot, that has been omitted, and he has attempted to commit Mr. Ray on a question covering only part of the field to be covered; and answer to this question which he thinks—it is not touching on the whole eligibility of the [fol. 100] man with respect to examining the eligibility of the man to participate in the primary.

Judge McElroy: Overrule.

Judge Windham: Overrule.

A. Read that question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. I would say this. The jurisdiction is a very important matter.

Mr. Wilkinson: We move to exclude that.

The Witness: Wait a minute.

Mr. Wilkinson: It is not responsive to the question.

Judge McElroy: I think he would be entitled to answer it to see what his answer is.

Mr. Wilkinson: All right. We reserve.

Judge McElroy: We will decide whether it is responsive.

A. In my study of the law for many years, I think I have a conception of jurisdiction. Courts are jealous of that jurisdiction. They don't want it, but once he has got it, he keeps it. He exercises it when he feels that it is the time to exercise it. This court here, since I have been in here, has made tantative rulings. I have no right to make him produce a definite ruling on his tentative ruling. That is his province.

I have a judicial function, as I conceive it, to perform, not just to approve anybody or to dispel them, but a judicial function the same as this court with this exception, they can punish for contempt, and I can enjoy contempt. I can't punish, therefore, I don't think you have a right, any more than I have, to ask these two judges right now to let's

quit, when they say that I have until March 1 to contemplate these matters within my own judicial function, and, therefore, I wrote this letter to you and gave you, I think, the legal conception.

Q. Referring to the letter of January 30?

A. Which I will quote: "I am doing my best to serve the voters throughout the state and expect to pass on all matters presented to me to the best of my ability and within the time required by law."

And that is the judicial function, the time required by law.

[fol. 101] Now, I will state, too, in connection with that, that I have quite a number, numbers and numbers of qualifications on my desk for this and different offices throughout the State, and I haven't passed on a one of them yet. In my judicial determination, not a single one of them has been passed on. They file them with the Secretary, and they file them with me as required by the Code, and there is 40 days prior to the election in which I must certify those that are qualified under the Code. The Code gives 40 days, and I conceive I have a right in my judicial discretion to pass on all of them, good, bad, or indifferent, just so they are passed on within the time prescribed by the statute.

Mr. Wilkinson: We move to exclude the answer of the witness because it is not responsive to the question.

Judge McElroy: I would vote to overrule on the ground it would still be relevant, although in some degree, not responsive.

Mr. Wilkinson: All right. We reserve an exception.

Q. Will you tell the court now whether or not you intend to certify Mr. Blair's declaration of candidacy for Presidential and Vice-Presidential Elector to the Secretary of State?

A. I decline to answer unless the court requires me.

Mr. Wilkinson: I think the court should require him to answer it.

The Witness: I think it is my prerogative.

Mr. Wilkinson: We ask the court to require him to an-

swer it. You required Mr. Blair to say what he intended to do.

Mr. Cook: If the court pleases, we object right there, and although he is under a duty to determine whether or not this man is eligible to participate or eligible to vote in this primary election, not qualified, but eligible to vote, and that, to me, embraces a fulfillment, not only of Section 345 but 347.

Judge Windham: Mr. Cook let me ask you this question: I am not speaking to the matters Mr. Ray spoke about. I am speaking to the one you spoke about.

Mr. Cook: Yes, sir.

Judge Windham: If Mr. Ray has been, and still is of the opinion and judgment that the requirement of the State Committee that he pledge himself to aid and support the [fol. 102] nominees of the President and Vice-President as made in the National Democratic Convention, if he has been and still is of the opinion that that is valid and binding, and if that is the action of the Committee, which I assume all hands agree it is, and if he finds that that has not been complied with, which, of course, we know he has found it had not been complied with, and if after finding for that reason he cannot and will not certify him, then, does he need to look for three or four or five or six other reasons for not certifying him as to whether or not he is eligible to vote in the primary and so forth and so on?

Mr. Cook: I don't think he is in a mandamus proceeding, especially where it is anticipatory. I don't think he is obliged to commit himself on any one reason, just like your Honor, in rendering a decision, can put it on several grounds for fear if you put it on one ground you will be wrong, but on another ground you can be affirmed.

I submit to your Honor he is entitled to every ground to rest a decision on, and not do any sequence in reasoning of time. That would be my answer, if there exists a ground he is not eligible to vote, then he does not possess one of the three qualifications to have his name on the ballots and he could rest it on that ground. That would be my answer, he wouldn't be obliged to put any one before the court.

Judge Windham: There are some matters with refer-

ence to such a proposition that I realize would rest in investigation, checking and so forth.

This matter here, we all know what the State Committee required. We all know what his tendered pledge was; we all know it left out that part of it, so you don't need any consequence, do you, with reference to that phase of it.

Now, in this petition for a mandamus, this Petitioner attempts to show a reason why he filed it now rather than waiting. It wouldn't be necessary to use the language he uses in that respect, but in substance, as I remember it, it was that Mr. Ray at the time it was filed with him had an abiding judgment it was to be rejected, and that he would not—and that he would, in due course, reject it, but that he did not reject it, but instead held it up. Now, the [fol. 103] Petitioner says that the time would eat him out of his rights. I haven't attempted to quote him, but he says in substance, I think said something of that sort in here. So, if the Respondent here at that time was acquainted with a matter which would keep him from certifying it, as I say, on that matter, I don't see that there could be any dispute as to the facts, and no investigation required because it is all in here. No man could make a mistake about what the facts were if he was at that time convinced that matter was there, and he would have to know the facts; we all realize that, and if he was convinced that ruling of the Committee was valid and binding, and therefore his duty to enforce it, and he would enforce it, and knew he would enforce it, then, as I say, it seems to me he wouldn't need five more reasons not to qualify him, would he?

Mr. Cook: If the court please, I could rest the——

Judge McElroy: Do you understand the question?

Mr. Cook: I understand it.

Judge McElroy: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Cook: There is another consideration; I don't want to bore you or wear you out, but in addition to omitting this particular part of the oath, he gratuitously writes an oath of his own, and inserts a political matter, which, from

his examination just now, indicates the sum total of his political contention; that is, he will not vote for Truman or anybody applicating the Truman-Humphrey Civil Rights Program.

That is inserted in there, and I want to say to the court this: Mr. Ray can be considering, in addition to the pledge, the fact that he understood here he was bound to certify and oath, whether a man subscribes to the full oath at all, or even though he subscribes to the full oath, whether or not he is entitled to write in there a political platform or statement of his political creed. Whether he could treat it as superfluous or whether it was a material part of it, or whether it would eradicate the whole instrument, we think he is entitled to tell you that.

[fol. 104] Judge McElroy: He just asked the question do you now have the intention not to certify or certify his candidacy to the Secretary of State.

Mr. Wilkinson: As required by law.

Judge McElroy: He is not asking whether he has made up his mind or whether he has good reasons or possible reasons why he should or should not be.

I am of the opinion, Judge Windham, we should request Mr. Ray to answer the question and overrule the objection.

Mr. Cook: We except.

The Witness: Before you rule on that, may I state this. Here is a reservation in the rules in emergency the Chairman, at his discretion, may take a vote of the membership by mail or referendum on any matter except as otherwise provided by law or the rules of this Committee.

Given that discretion, if it is violating the law, I come under it, but if it is not, except as otherwise provided by the law or the rules of the Committee, I fix the time to vote, and I have a right to submit a matter of this sort to the 72 members—71 over the State, 8 in each District, and that has often been done on matters by my predecessors, and not only that, I have a right, if the court pleases, to go back into newspaper articles, editorials, and matters of that sort. In other words, a full investigation, but if we are going to be required pre-emptorily to throw down the discretion, which we think is very broad in these mat-

ters, I think the discretion of the Executive Committee is a very fine——

Q. Are you arguing or testifying?

A. I am stating it before they rule.

It substitutes the discretion of the court for the discretion of the Committee. I want to get that in the record because that is virtually what it does. The Court would put me in jail for contempt if I asked the court to pass on a matter before your time for delivery, and I have no power to retaliate, and have no desire to retaliate, but I just wish—if you wish to dispose of the discretion of the court for the discretion of the Committee, that is your province.

[fol. 105] Judge Windham: The question was do you intend to do that.

The Witness: That is a matter that hasn't yet been determined, and I have ample time for it.

Judge Windham: Do you mean to question him about his present intent?

The Witness: I have a right to search his whole District and all he has ever written, said or argued over the State, and not only——

Mr. Wilkinson: If that is argument I have no objection to it going into the record. If it is testimony, I move to strike it because nobody has asked him anything about it.

The Witness: I am talking about the reasons.

Judge Windham: He is asking you whether or not you questioned him about a present intent or state of mind at the time you filed this petition.

Mr. Wilkinson: I am going to ask him about both, Judge. I want to show a continuous attitude of mind, and I don't think there is any dispute about it.

Judge Windham: I will vote to overrule the objection.

I would say this with respect to submitting the matter to the Committee, of course, that provision is in there, and very wisely so, but if it has to do with this clause omitted, which was fully discussed, apparently, by the full Committee, very warmly and hotly discussed, and in the end passed upon favorably to put that requirement in there, I would not—it would seem, probably, that would not be the

sort of matters that would then be resubmitted back to them within a week or two or three.

Mr. Wilkinson: A vain and useless performance.

Mr. Mayfield: It might be to the qualification of a particular candidate which Mr. Ray might desire to submit to the Committee as a whole.

Judge Windham: If you have one upon which he and the Committee have already passed by a majority vote, it seems to me he wouldn't need five or six more reasons for rejecting it.

Mr. Mayfield: May I point out to the court very respectfully that the court's order here required Mr. Ray to [fol. 106] show cause why he should not certify his candidacy to the Secretary of State, and the court's order did not point out and require him to state whether or not he would or would not certify his candidacy to the Secretary of State for one particular reason, but ordered him to show cause why he should not certify him to the Secretary of State on all grounds of qualification?

Mr. Cook: If the court pleases, we want to be definitely understood on this point. We are going to do our best to have—give this court every reason why this application should not be submitted, and not limited solely to his refusal.

Judge Windham: You are not limited to that. That doesn't have to do with any phase of this case, probably, except one, and that phase of it is the question of whether or not this petition for mandamus was filed too soon.

Mr. Cook: You mean the course of his examination?

Judge Windham: This question he has put to Mr. Ray, in my judgment, has only to do with that phase of the case. It doesn't have to do with the merits of the case. If Mr. Ray had that in his mind, and we held it wasn't good, but if your proof shows another reason why he was entitled to, you still haven't lost the other reason.

The Witness: I want to say this, your Honor, in addition to what has been said. Shortly after Mr. Wilkinson left my office on the first day, someone, I don't remember who, from the Birmingham Post-Herald called me on the telephone to know if it had been submitted.

I said, yes. Then he said, what are you going to do about it?

I told him I would handle it within due time.

I don't think—I am sure it was less than an hour, maybe 30 minutes after he left my office when I got this phone call. I knew then it was a political case so far as this Committee was concerned.

I have another one or two on my desk or in my file of the same type. This is not the only one I have. I haven't passed on any of them as to whether they are sufficient or insufficient, full or deleted. I simply laid them aside, and I have—as I read the statute, I am following the law as [fol. 107] best I know how, and I think within the discretion I have a right to pass on it in an ordinary fashion rather than be brought in by newspapers immediately to accommodate somebody who is trying to rush the game. That is what I concede to be the purpose.

Mr. Wilkinson: After all of that dissertation, I come back to my question.

Judge Windham: The question, we probably haven't passed on it.

What is your ruling?

Judge McElroy: I think Mr. Ray should answer the question that was asked him last.

Judge Windham: I so rule.

Judge McElroy: As to whether or not he intends or not to set aside the candidacy.

Mr. Wilkinson: Set aside the candidacy to the Secretary of State of Mr. Edmund Blair.

Mr. Cook: We except.

Judge McElroy: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Wilkinson: Let me change that question because he is not required to set aside the declaration.

Mr. Madison: May we add an additional ground?

Q. I will ask you to state to the court whether or not you intend to certify to the Secretary of State in less than 40 days before the primary that Edmund Blair is a candi-

date for nomination for Presidential and Vice-Presidential Elector?

Mr. Cook: We renew our objection.

Judge Windham: Any further ground?

Mr. Madison: On the further ground it is not limited to a time prior to the filing of this mandamus suit.

Judge Windham: Well, as I remarked a moment ago, I believe we are entirely probably out of the status of the situation as of the time this petition was filed, but the present state might well be related to the state as of [fol. 108] that time.

Do you think we should overrule?

Judge McElroy: I wish to overrule.

Mr. Cook: We except.

A. In answer to that question, and at the requirement of the court, I will state under the circumstances I will not approve it until ordered to do so by the court.

Q. That was also your position at the time that the declaration of candidacy was filed with you and the assessment fee fixed by the Committee was paid to you, was it not?

A. Well, I wouldn't say so.

We had a pleasant talk, and talked about health and old age, and a lot of different things, and I thought that it would be promptly, but I would not have to act overnight.

Even when you are engaged to a girl you have a little time to get ready. Like Old Brother Omey, he proposed 13 times. She turned him down 12, and he got elected on the 13th round.

Judge Windham: Let me suggest the engagement we had at 12:15.

Gentlemen, we can't complete this examination, of course, now, so we will meet again at 2 o'clock.

(Whereupon, at 12:13 p. m., proceedings were in recess until 2 p. m., at which time, proceedings were resumed as follows:)

February 5, 1952, 2:00 P. M.

Afternoon Recess

BEN F. RAY, thereupon resumed the witness stand and testified further as follows:

Direct examination—Resumed.

By Mr. Wilkinson:

Q. Mr. Ray, I will ask you if this isn't true; that you have entertained the opinion before and since this declaration of candidacy was presented to you, that no name should be set aside to the Secretary of State who did not sign the oath provided for in the resolution of the Committee?

Mr. Cook: We object to that; conclusion of the witness; calls for incompetent, irrelevant, and immaterial matter; [fol. 109] not limited to this particular application.

Judge McElroy: I overrule the objection.

A. Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. It was never discussed with any individual that I remember, but the matter was argued in the State Committee. One hour was set apart for this, and it was discussed by four able men, Mr. McCorvey of Mobile, Mr. Boswell of Geneva, Mr. Smyer of Birmingham, and Stuckley of Dothan. All four are able lawyers, and they presented it before the vote was taken, which was 44 for the resolution and 26 against.

Q. Will you please read the question to the witness and let him answer?

Mr. Wilkinson: I move to exclude his answer.

Judge McElroy: Read the question, please.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Judge Windham: I don't think it is responsive.

Judge McElroy: I would like to have a more direct response to that if you can state.

A. Well, I think that common sense would dictate that we would expect candidates to comply with the general terms of the resolution, and I will say this, the word "substantial" was cut out of the old one, just in order that you will know that the language in it was selected by—when we wrote it.

Q. You are Chairman of the Committee, are you not?

A. Yes, sir.

Q. And you would not certify a name to the Secretary of State as a candidate for elector who did not comply with the orders of the Committee, would you?

Mr. Cook: I object to that.

Judge McElroy: Overrule.

Judge Windham: Overrule.

A. I don't think I would be expected to do it. I think it would be foolish to expect it. I think your act in coming [fol. 110] up there was foolish, because you knew when you came up there the Committee had passed on the matter, but you are asking me to decide something that you already had your mind made up, and the resolution was perfectly clear.

Mr. Wilkinson: I was just asking you to follow the law instead of the Committee.

Mr. Cook: We object to that as an argument.

Judge Windham: I think it is argument on both sides.

Q. Regardless of what might be expected, or what anybody might have a right to expect, what I want to make clear to this court is whether or not you would certify to the Secretary of State the name of any person as a candidate who did not take the oath prescribed in the Committee's resolution of January 26, 1952?

A. I don't think I would have authority to do it, but I would do it under orders of the court.

Q. That is what I mean?

A. I would do it under orders of the court.

Q. It would take a court order, wouldn't it?

A. I would have no authority to do it.

Q. You wouldn't do it, and don't claim you intend to do it without court order?

A. I am not against you or anybody else. I am for you, if you will come along and be with the Party, but I am against you just taking the Party and dragging it off with you.

Q. There may be a difference of opinion about that. I might ask you to come along with the Party.

A. We will be there.

Q. I am still trying to get an answer to this question. Will you state to the court whether or not you will certify to the Secretary of State the name of anybody as a candidate for elector who does not take the oath prescribed by the Committee in its resolution of January 26, 1952?

A. I think I have already answered that.

Judge McElroy: I will say this. I interpreted Mr. Ray's answer to be that he would not make any such certification except under order of the court, and unless Mr. Ray [fol. 111] says we have misinterpreted that, we will consider that interpretation as being correct.

Mr. Wilkinson: All right, your Honor, that is all I care to ask him.

Cross-examination.

By Mr. Cook:

Q. Mr. Ray, you have been ordered to show cause, if any you have, why a writ should not be issued to you commanding you to certify to the Secretary of State this application.

Now, I want you to outline or to give the court the reasons in response to this order here why you shouldn't certify this in addition to the answer—in addition to the reason that Judge Wilkinson has attempted to bring out; are there other reasons beside the fact that the oath was omitted.

Mr. Wilkinson: I object to that; the reasons are set up in his answer, and the issued are defined by the petition and the answer filed by the Respondent in this case. I object to him going outside the answer.

Mr. Cook: We will amend the answer.

Judge Windham: You have that in the answer? About the gratuitous in session that he made.

The Witness: Where is the original?

Mr. Cook: If the court pleases, all of my answers get away from me.

The Witness: Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

Mr. Wilkinson: I made an objection to that, if your Honor pleases, that the reasons are stated in his answer filed to the petition, and he can't go beyond that.

Judge McElroy: Can you gentlemen refer to the answer there?

Judge Windham: He has been questioned about a state of mind and a reason by you. I think it is true enough that the answer must encompass all that he has, that is perfectly true, but since he has been questioned on cross-examination about what his state of mind was on it, and as to the specific issue, I think that probably he would be entitled on redirect examination to ask further questions [fol. 112] about reasons that obtained in his own mind. I don't think it makes much difference, probably, because as I understand it, he has put various other reasons in his answer.

What is your thought on that?

Judge McElroy: I think we will go ahead and let it come in. If it is legal, we will consider it, however, if it is not legal and has no value, we won't consider it.

The Witness: I would like to say this in view of the judge's statement: I am Horace Wilkinson's witness. I am on direct with him. I am on cross-examination now.

Horace vouches for me, and I appreciate his going that far with me. I want the record to show I am his witness, and I wasn't—if I was on cross-examination I really would work on him, but I am so nice to him he has been nice to me.

Mr. Wilkinson: Thank you, Ben, thank you.

Judge Windham: I made a mistake, where I said he was redirect examination, it should be cross-examination.

The Witness: I am now on the stand in the hands of a hostile examiner.

Mr. Wilkinson: I will say this, I don't think you will say anything on cross-examination that you wouldn't say on direct examination.

Mr. Cook: If the court pleases, I would like——

The Witness: I want to answer that question.

Mr. Cook: All right.

The Witness: "I further agree to abide by the results of the primary election in which I am a candidate, and I do pledge myself to aid and support all the nominees in said primary election."

As far as that is concerned, up to that point, that is just 100 per cent. His "but" clause now, is this: "But I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program."

That is a platform added to what the Committee down there left out. That is a Party platform. It is not a bid or a pledge. I wanted to consider that, see how that would [fol. 113] make a good argument on anybody.

Q. Do you consider that part that you have just read "But I will not vote for Harry S. Truman" and so forth, do you consider that part authorized by the Committee's resolution which counsel has in the affidavit?

Mr. Wilkinson: We object to that; it isn't a question of whether he considers it or not; the law recognizes—it is what the law recognizes.

Judge Windham: He has been questioned about what he had in his mind and the reasons for it, and so forth. I would vote to overrule and let him be questioned further.

Judge McElroy: For whatever value it may be, and for whatever materiality it may have, if any.

Mr. Wilkinson: We except.

A. I don't know what is in the mind of the affiant putting it in there. In the first place, Harry S. Truman is not a candidate. In the second place, he may be dead by then; he may never be a candidate. In the third place, it is basing his whole political philosophy, if I get it right, on an individual which is not a party matter, except as he out for a platform from a party.

Just a man out in the world—Eisenhower right now has these boys snipe hunting. They are holding an empty sack. He may never come from behind the eight ball, and, therefore, I hold an empty sack, dealing with unrealistic matters.

When one finally comes up against real men mentioned in a Party platform, with a platform, and a man together, and then you are ready to go to work on folks.

So, I think that makes an affidavit rather funny and ridiculous, but I don't know that that is sufficient to turn it down on, but I would like to think about it a little.

Q. Irrespective, I want to put it this way—irrespective of the omission of the pledge to support the nominees of the National Convention for President and Vice-President, irrespective of the omission of that, what I would like to ask you is the inclusion of the gratuitous insertion "I will not support Truman" and so forth, is that objectionable to you when it comes to passing—when it comes to certifying [fol. 114] this declaration of candidacy to the Secretary of State?

Mr. Wilkinson: Same objection on the same grounds.

A. No; he can run on the resolution against Harry Truman.

Q. I beg your pardon?

A. He can run on the resolution against Harry Truman.

Q. What I am asking you is can he insert that kind of pledge or platform in his qualifying affidavit?

A. I don't think so.

Q. Is that your best judgment about it?

A. That is my best judgment now, that that is not a proper matter to come into the resolution.

Q. I will ask you, if you know, of your experience as Chairman of this Committee, if so-called advocates of the Truman-Humphrey Civil Rights Program are limited to the National Democratic Party, or did the Republican Party have a Civil Rights Plank in their platform?

A. They are the daddy of it.

Q. Did they have it in 1944 and 1948?

A. They have had it all along. The fact of the business

is, there is a great deal of misunderstanding about civil rights. If you take civil rights out of the book, the lawyers and judges would have to go home.

Q. I will ask you this, if, according to your best recollection, the Civil Rights Plank in both Party platforms in 1948 were substantially similar?

A. Parallel. That is right good pleading in equity where the same thing is involved, the bill and the answer would have the same matter set up in it or parallel, and it takes no proof or no argument; it is equity.

Q. Do you really know what the so-called Truman-Humphrey Civil Rights Program is?

A. No.

Q. Do you know anyone else that does know?

A. No; it is subject to come up when the Convention meets.

[fol. 115] Q. Has this Petitioner explained to you what it meant or offered to explain it?

A. Just in this.

Q. In your judgment would it introduce confusion and discord in the Democratic Party in Alabama to include that in the affidavit?

A. That is right. It is like batting at a ball that isn't pitched. It is breaking your back.

Q. Is that your best judgment about it?

A. Yes, sir.

Q. Counselor for the petition has stated there is no connection—this primary is not concerned with the nominees of the National Party.

I will ask you whether or not the insertion gratuitously by this Petitioner of a pledge in his qualifying affidavit that he will not support Truman or anyone else who advocates the Truman-Humphrey Civil Rights Program, I will ask you whether or not he, by his qualifying affidavit, connects up this primary with the National Party Convention and its nominees?

Mr. Wilkinson: I object to that.

Judge McElroy: Whether he connects it up, what do you mean?

Mr. Cook: Whether he is bringing in the National Party nominees by his own criticism against it.

Judge McElroy: We would know that as well as anybody else.

Sustain the objection.

Judge Windham: The question calls for expert testimony. We sustain the objection.

Mr. Cook: We except.

Q. Are you acquainted with the machinery of the Democratic Party from the organization of the County Committees and the Beat Committeemen on up to the top echelon, the State Democratic Executive Committee; are you familiar with that?

A. Fairly well. I registered voters once; I have been on the Executive Committee some years ago; I have been a delegate to the National Convention; I have attended three of them and watched the platform being built, and, altogether I have a general working knowledge of it, and [fol. 116] I have read several volumes of Party Politics.

Q. Have you, in your experience, ever seen an affidavit submitted by a candidate as a part of his declaration of candidacy which contains such a gratuitous insertion as this Petitioner included in here; that is, that he would not support the Democratic nominees, and this that is in the pledge?

Mr. Wilkinson: We object on the same ground.

Judge McElroy: Overrule the objection.

Mr. Wilkinson: We except.

A. No; this is novel.

Q. You have never seen anything like it before?

A. No, sir. This mass of a hate campaign against individuals, and it is what elected him four years ago.

In my humble opinion, the Socialist and Democratic—and Thurmonites elected the Trumanites. They went out and preached hate against Truman, and American people will not convict a man on a hate program. They did not do it then, and if they want him elected again next year, they can just keep on doing it, but if they don't want Truman elected they had better drop the subject, because hate is a poor guide to the American people; they won't follow it.

Q. If you should certify this Petitioner as a candidate,

would that insertion of his own platform in there, if you do it voluntarily or through orders of the court, do you know of any limit this might—that might finally be drawn on what a candidate could put in his qualifying affidavit?

A. I reckon that would be true.

Q. But do you know of a border line or a line upon which he couldn't go?

A. It can be run to absurdity, which I think has already been done, and, moreover, it assume that the people in Alabama don't know their own mind.

The campaign of 1950 was a simple story for it. I went on the radio, and made the claim that I believed in the National Democratic Party, the two-party system, and would support the nominees from top to bottom. I have [fol. 117] copies of the speech in my office.

Q. Judge Wilkinson said something about wanting you to go along with the Party; do you think the majority of that Committee in 1944 is inclined to go along with the 26 in this issue?

A. They didn't do it.

Q. Have you ever met Mr. Blair before this proceeding was filed?

A. Yes; I think so.

Q. Has he ever talked to you about filing for Presidential elector in this race?

A. No.

Q. Has he ever called you on the telephone about it?

A. No.

Q. Has he written any letters about it?

A. No.

Q. All of your contact with the Petitioner with regard to this proceeding is his attorney here?

A. Yes.

Q. That is the only contact?

A. That is right.

Q. Has Mr. Blair ever offered, through his attorney or any other way, to file a qualifying affidavit in the language authorized by the Committee's resolution of January 26, 1952; has he ever offered to submit to you an affidavit in the language of the resolution that was provided in the resolution of January 26, 1952, has he?

A. No.

Q. Has he ever offered to withdraw the gratuitous language he inserted in the affidavit?

A. No.

Q. Let me ask you this: You heard Mr. Blair's testimony this morning to the effect that he might have written something in his papers, or in some way advocated or supported Admiral Crommlin when Senator Hill——

Mr. Wilkinson: I object to that; he didn't testify to that; there is no evidence to that effect.

Mr. Cook: The court will have to judge on that.

[fol. 118] Mr. Wilkinson: Mr. Blair said he had never made any—never written anything complimentary to Senator Hill and he had no recollection of anything appearing in his paper in support of Crommlin or anybody else.

Mr. Cook: He had to qualify his statement.

Judge McElroy: Whatever it was he said.

Q. I want to ask you if you have had an opportunity to make any investigation as to whether Mr. Blair aided or supported in any way Admiral Crommlin who ran on an independent ticket against Senator Hill in 1950?

A. No; I haven't had an opportunity.

Q. Would you like to have that opportunity?

Mr. Wilkinson: We object to that as incompetent, irrelevant, and immaterial.

Judge McElroy: Overruled.

Mr. Wilkinson: We except.

A. Well, we wouldn't mind seeing his magazines and checking his articles.

Q. Checking his files on that?

A. Checking his magazines and writings and some of his friends and neighbors who talked with him to see whether or not he has shown hostility to the Party and its loyal members.

Q. Are you charged with the judicial responsibility; that is, are you, as Chairman of the State Democratic Executive Committee of Alabama, charged with the judicial responsibility in determining the legality and correctness of applications or declarations of candidacy of all persons who must file such declaration of candidacy for any Statewide or Federal office?

Mr. Wilkinson: We object to the question; invades the province of the court; calls for a conclusion of law, and a conclusion of the witness.

Judge Windham: Were you reading from the resolution?

Mr. Cook: No, sir, from the answer, if the court pleases.

Judge McElroy: Don't the rules of the Committee that are attached clear that duty?

[fol. 119] The Witness: Yes, sir.

Judge McElroy: If they do; there is no dispute about the existence of such rules. The court will take judicial notice of the existence of the rule.

The Witness: I will say this for the court's benefit; that I was not elected as Chairman. I was selected by the group, and I never asked a single man to support me on it, either. They came to me and wanted me to be their Chairman. I said, well, I don't care anything about that, but it worked out. I was selected; I was not elected.

Judge McElroy: They got you?

The Witness: They got me, and I want to serve Horace. I would like for Horace to run again, run against Truman, and I would like for my other friend to run. They can run against Truman.

Mr. Wilkinson: Not under this resolution.

The Witness: Yes; you can; I can show you directly.

Mr. Wilkinson: Show me right now.

Judge Windham: We haven't got time right now.

The Witness: I say that anybody in the State that wants to run against Truman, hop on it and run. I know of nobody that is advocating him.

Q. In your judgment, Mr. Ray, are you bound by the rules and regulations of the Committee and the resolution on January 26 with respect to satisfying declarations of candidacy for the Secretary of State?

A. I think so.

Mr. Wilkinson: How long do we have to put up with questions like that?

Mr. Cook: They have asked about his state of mind.

Judge Windham: He has answered on it.

Mr. Wilkinson: He is bound by the rules of the Committee; he has made that pretty plain.

Q. Do you concede it would be a violation of the law if you certified an applicant down there who did not conform to the affidavit required by the Committee of the Party?

Mr. Wilkinson: Same objection on the same ground.

[fol. 120] Judge Windham: You may answer; overrule the objection.

Mr. Wilkinson: We except.

A. I think it would be beyond my duty. It would be done at my own peril.

Q. Have you had occasion or had the opportunity, since this petition, or since this application was submitted to you, to contact and get some response from these other 71 members of the State Democratic Executive Committee?

Mr. Wilkinson: I object to that on the same ground, incompetent, irrelevant, and immaterial.

Judge McElroy: Overrule the objection.

Mr. Wilkinson: We except.

A. Nothing except one or two long-distance calls.

Q. Has Mr. Blair or his attorney ever asked you or requested you to advise with or consult with the other members of the State Committee with regard to this matter?

Mr. Wilkinson: Same objection on the same grounds.

Judge Windham: Overrule.

Mr. Wilkinson: We except.

A. No, sir.

Q. Now, with regard to the affidavit which Mister——

Judge Windham: You might ask him since this pamphlet attached to the answer, the rules, whether or not that is a copy of the rules; is it?

The Witness: Yes, sir, I think I put the seal on it, also.

Q. That is a true copy that is in force and effect at the present time of the rules of the Party?

A. Yes, sir, and have been the rules for years and years, I guess 20 years, hardly altered.

Q. Those are the same rules that were in force and effect during the term of your predecessor Mr. McCorvey?

A. Yes, sir; he furnished me with the copy I had reprinted.

Q. I want to ask you about the contents of the affidavit he submitted where he stated that: "I further agree to abide by the results of the primary election in which I am [fol. 121] a candidate, and I do pledge my air and support of all the nominees in said primary election."

Do you believe that this man would support the nominees for Presidential elector in that primary election who proposed or declared they would vote in opposition to his declaration here about supporting Truman; do you believe that?

A. I don't know as I want to—I don't care to comment on that.

Q. You don't care to comment on that?

A. That is up to him.

Q. I might ask you this in regard to that question, whether you believe the affidavit—as I understand the rules, if the court pleases, he can appeal to the Committee on anything where he doesn't believe his affidavit.

Do you believe he is eligible to participate in the Democratic primary in 1952 in view of the pledge that is required to be placed on the ballot?

Mr. Wilkinson: Same objection on the same grounds.

The Court: Overrule the objection.

Mr. Wilkinson: We except.

A. Participating means as a voter and a candidate. I don't know that he declares what he would do if he is a voter, or does he?

Q. As a voter I notice the pledge requires him to pledge to support the nominees of the National Party.

A. He is basing this as a candidate.

Q. The law requires he be eligible to vote in order to be a candidate?

A. That is true, but they don't have to have the same regulations. They may be the same, and in this instance, the Committee thought it wise to make them the same, so the candidate would have no more leeway than the voter, and vice versa.

Q. Now, in regard to what you believe about his oath here, I notice the resolution provides verbatim the language or pledge that most of the ballots of the voters—

A. That is right.

Q. Which reads:

[fol. 122] "By casting this ballot I do pledge myself to abide by the results of the primary election and to aid in support of all the nominees thereof in the ensuing general election. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."

In view of that language that the voter must pledge to support the nominees of the Party, I ask you again, if in your judgment, you believe that his affidavit is sufficient?

Mr. Wilkinson: We make the same objection.

Judge McElroy: Sufficient to do what?

Mr. Cook: Is sufficient to render him eligible to be a voter in the primary election.

Judge McElroy: What he is asking you is in your judgment whether or not Mr. Edmund Blair is not disqualified to vote in the primary election to be held on May 6, 1952.

A. Well, based on the language in this resolution here, I am not prepared to say, but he could still be a voter, hold his nose and vote and go home and say nothing, but he wants the right to go out and argue before the jury in this. He wants to go to the jury. Well, the court—our idea was to say to those fellows, all of them who want to run, if you are going to argue against your Party and your nominee, get in a Party that will let you do that, but not in the Democratic Party.

Just like the court tells me not to argue this any more; I don't want to hear that any more; you sustain the objection, and ask me not to argue that any more or you will put me in jail.

This resolution says to the gentlemen you can cuss Truman, you can cuss the Democratic Party from now on, but you get on another stump to do it, just don't claim to be a Democrat and cuss out your own household. That is the temper of it.

Q. Mr. Ray, I have got you on cross-examination, and I want to press this question. I notice that the ballot pledges him to vote for the nominees of the National Party for President and Vice-President. While he has taken an oath in his declaration of candidacy that he would not [fol. 123] support the—while he would not support Truman, and has omitted that oath from his affidavit.

Now, I ask you whether or not in view of that language he would be eligible to vote in the Democratic primary election?

Mr. Wilkinson: We make the same objection; calls for a conclusion; question of law; incompetent, irrelevant, and immaterial; invades the province of the court.

Mr. Cook: He has a lot of authority and discretion.

Judge Windham: I believe there is a question of law here whether or not in fact he would be eligible, but, at the same time, in passing on a matter of this sort that comes to him, that would be one of the questions that he might well be called upon to consider.

The Witness: That is involved.

Judge Windham: I will overrule.

The Witness: You can't be a candidate without being a voter.

Mr. Wilkinson: We except.

The Witness: But you can be a voter and not be a candidate.

Q. The court says you can answer the question. Read the question.

(Whereupon, the Reporter read the question propounded as last above recorded.)

A. I should say if I went up to the polls and got a ballot, or him there, and he had not voted for the nominees of the Democratic Party, his ballot might be handled by the election officers and not be counted.

Q. Has he not already announced he wouldn't support them?

A. That is a matter of judicial determination, and that is one of the things I would like to ponder over a good while, what sort of man we have that says nothing about—he

doesn't limit his voting though he limits himself as a candidate.

He doesn't say about a voter, does he?

Q. No, as a voter; the voters are required by the ballot to pledge themselves to support.

Judge Windham: He says in his application to become a [fol. 124] candidate as such he would not vote for Truman.

The Witness: As an elector.

Judge McElroy: I believe we have gone over this a number of times.

Mr. Wilkinson: Under the gentleman's own statement, the Committee wants to put the voters and the candidates on the same level. If the part of the affidavit objected to is objectionable and is stricken out as a candidate, the same law would strike it out from the voter part of it.

The Witness: I will say for the court's benefit on that for your consideration I have found no case, in the Supreme Court of the United States or otherwise, that has surrounded a candidate, or even a nominee, with the Federal Constitution on the same theory that the—that goes with the elector at the general election. When he is elected, he has run the gauntlet both in the primary and general election, then he is an elector for the first time full-fledged. The Constitution of the United States may protect him as an elector full-grown, but how he is wearing the red feather of a candidate, going around over the State, I think the primary says in order to get to be an elector every case surrounds him with the Federal protection that I understand my good friend claims that he is surrounded by.

I just want that in the record, because I don't find any case that protects the candidate or the nominee after he gets to be nominated. He has got to first be a candidate; second he is a nominee after the second primary, we will say, then it is three or four months he struts around as the nominee, enjoys emoluments of the Party, and all the defeated candidates come up and bow to him and say you licked me in a fair race, you are it.

He still hasn't got the Federal around him though, as I see it, but after he goes through the general election and

licks the Independents and the Republicans, he may have something there, I don't know whether he has or not.

Mr. Cook: That is all.

Redirect examination.

By Mr. Wilkinson:

Q. Mr. Ray, how long have you been practicing law? [fol. 125] A. Since 1913.

Q. 1913?

A. August 1.

Q. I will ask you in your opinion as a lawyer and in your opinion as the Chairman of the State Committee if the addition to your declaration of candidacy, what counsel has termed gratuitous language, namely, that he would not vote for Truman or anyone sponspring the Truman Civil Rights Program affects the legality of that document in any way, shape, form or fashion.

A. If what?

Q. The addition of that gratuitous language, namely, that I will not support Truman or Truman's Civil Rights or anybody who sponsors the Truman-Humphrey Civil Rights Program affects the legality of the pledge in any degree.

A. I think it does.

Q. In what respect?

A. It is a platform in which he is trying to put in a general way as a part of a Democratic platform in Alabama.

Q. Is there any law that prohibits a man from announcing his platform; do you have any rules that prohibit him from stating it in his declaration?

A. I think so.

Q. Give us the rule.

Mr. Cook: The rules speak for themselves.

The Witness: This is not a declaration of candidacy; this is filing to become a candidate.

Q. It is a declaration of candidacy made so by law.

Mr. Cook: The rules speak for themselves. A man must be a Democrat, and Mr. Ray couldn't take a man who didn't express fealty to the Party and governing body.

Mr. Wilkinson: He has expressed fealty to the Party he is required to express.

Judge Windham: You have asked him about the rules, and they are before us.

[fol. 126] Judge McElroy: His opinions don't make or not make the law, but it would be worth, of course, to be considered. It is really an argument, and no evidence of what the law is in the sense that we receive evidence of the fact.

Mr. Wilkinson: I want to know what rule he had in mind.

Judge McElroy: Judge, there is not any rules involved other than those already before us, statutes and rules of the Committee.

The Witness: I would like to have the opportunity of calling two or three things to the court's attention, if you will.

Judge McElroy: All right.

Mr. Wilkinson: That is all.

Recross-examination.

By Mr. Cook:

Q. He asked you in what way they would be prohibited by law—he asked you if agreeing not to support Truman and pledging himself never to support Truman or anybody else who is thinking about the Civil Rights Program, I will ask you whether or not that offends this provision of the resolution not to give aid and support to the opponents of the Party?

A. I think so.

Mr. Cook: That is all.

Redirect examination.

By Mr. Wilkinson:

Q. Suppose I say I will never support John L. Lewis or anybody who advocates what he stands for. Would that bar me from the Party?

Mr. Cook: We object to that.

Mr. Wilkinson: Of course, you object, when the shoe begins to pinch you and we expose the absurdity of the position, you then object.

Judge Windham: Gentlemen, what you are really taking is testimony, or that is what you are supposed to be doing. What you are doing is not a question of fact, at all, as I see it. It is a question of law which would be properly dealt with in any argument, but I don't think it would properly be dealt with in the taking of testimony.

Mr. Wilkinson: The court let the other side go into it [fol. 127] at great length.

Judge McElroy: All right; go ahead.

Judge Windham: I was speaking to both of you.

Mr. Wilkinson: No; I am not going to say anything because I have gotten crosswise with the court. The other side can talk for an hour and a half, but when I talk five minutes I am cut down, so I will quit.

Judge Windham: Any further questions?

Mr. Cook: Judge, if he will quit, I will too.

The Witness: Let me get through since I am up here and I will offer a few things.

Will you get your resolution there?

Judge McElroy: Is this evidence or argument?

Judge Windham: Suppose we think about it in this way. We are proceeding rather informally. When you gentlemen are through with the evidence on both sides, if Mr. Ray himself in person would like to participate in the argument it is perfectly agreeable to me, and I assume it would be to you; is that right?

Mr. Wilkinson: Yes, sir; that is right. I can't tell half of what he says, whether it is testimony or argument.

Mr. Ray: I would like to make a statement.

Judge Windham: We will be glad to hear from you.

Judge McElroy: Are you talking about arguing some law?

Mr. Ray: I want to call attention to a few things, but I can wait.

Judge McElroy: Let's wait until the arguments come in. Judge, does that conclude for you?

Mr. Wilkinson: Yes, sir; I rest.

Petitioner rests.

Mr. Cook: I want to ask Mr. Blair one other question.

Judge McElroy: Are you through with Mr. Ray?

Mr. Cook: Yes, sir.

(Witness excused.)

Judge McElroy: Mr. Blair, come around.

EDMUND BLAIR, whereupon resumed the witness stand, and testified further as follows:

[fol. 128] Recross-examination.

By Mr. Cook:

Q. Mr. Blair, you have omitted from your oath and inserted in your declaration of candidacy a provision which is set—which is inserted in the oath prescribed by the State Democratic Executive Committee of Alabama to-wit: "I do pledge myself to aid and support all of the nominees in said primary election—I beg your pardon, that isn't it—you have omitted from your own oath the following provision from the oath specified by the State Democratic Executive Committee in these words:

"And also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."

Now, I ask you are you willing to aid and support the nominees of the National Convention of the Democratic Party for President and Vice President of the United States in 1952?

Judge Windham: Are you asking him as a voter or as one who conceivably might have obtained the office as elector?

Mr. Cook: I will ask him first as a candidate for elector.

A. You mean as a candidate for elector, as an elector?

Q. As an elector, are you willing?

A. You mean after I am elected an elector?

Q. Yes, sir; are you willing to now pledge to us to aid

and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States in 1952.

Mr. Wilkinson: We object to the question because the gentleman's position is perfectly clear. He says he won't vote for Truman or anybody who votes for the Truman Program.

Mr. Mayfield: We object to the counsel making the statement.

Judge Windham: I think that part is perfectly clear; as a candidate he will not support Truman and certain others if they are the Democratic Party nominees.

Q. I want to ask you the flat question. Why sidestep that provision by omitting it and inserting in lieu of it the pledge I will not support one particular man or any contemporaries of that man on a particular political point. [fol. 129] I want to ask him the categorical question if he is willing now to pledge himself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States in 1952.

Mr. Wilkinson: That is like asking a boy to spell cat and he spells it, and you say is it feminine or masculine gender, and he says show me the cat.

Mr. Cook: I want that question in the record and it isn't in there before.

Mr. Wilkinson: I think his position is clear.

Judge McElroy: I would vote to sustain for this reason. If it is necessary for that to be in there, then he hasn't put it in there, so he couldn't qualify himself. If it is not necessary for it to be in there then it doesn't amount to anything. How could it be otherwise? I mean, if he in his mind was willing to do it and told you he was, that still wouldn't make his application good because he didn't put it in his application if that requirement is legal and valid he is out.

Mr. Cook: He just omits it and he is silent on it, and I wanted it categorically in the record. I will take your ruling if you sustain and except.

Judge Windham: That would be my ruling.

Judge McElroy: I vote with Judge Windham.

Mr. Cook: We except.

Q. Are you willing—do you intend to participate as a voter in the Democratic primary election of 1952?

A. Yes, sir.

Q. Are you willing as such voter to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States in 1952?

Mr. Wilkinson: We object to that because his position is made clear by his declaration of candidacy. He says he will vote for all the nominees of the Party in Alabama.

Mr. Cook: We object to counsel arguing.

Mr. Wilkinson: But he will not cast an electoral vote for [fol. 130] Mr. Truman.

Judge Windham: We have had that question, I think, in exactly the same form once before, and when we ruled on it I pointed out this: The statute said something about the candidate must be eligible to be a voter in the said primary. It does not deal with the question of what afterwards he does.

It is a question of whether or not he is eligible to vote in that primary.

Mr. Wilkinson: Yes, sir.

Judge Windham: And the general statute on voting uses the word he must be qualified as a voter. Section 254 says he must be eligible to vote in that primary otherwise he cannot become a candidate in the primary. If he is a qualified voter in his county, he has been and still is, and if he goes down there and chooses to walk in and get a ballot with that reading on it and to vote it, wouldn't he be eligible to do that?

Mr. Cook: He would be adopting the pledge, if the court pleases, and he would be taking a position contrary to his oath here.

Mr. Wilkinson: Not at all, if your Honor pleases. He can support every nominee in the primary without ever casting an electoral vote for Truman. He can support every nominee of the primary, but he says if I am elected the

performance of my constitutional duty as an elector, I am not going to do this.

Judge Windham: When the witness was questioned on that same point he said this. He said that if in the primary the people can be given an opportunity to speak on the question and they voted against what he thought they should vote that he would support in the general election the nominee——

Mr. Wilkinson: Sure.

Judge Windham: —as a voter he would, he said.

But after answering if the people could not be given an opportunity in the primary to speak their wishes and their will that he would feel differently. I haven't used his exact language, but the point is we have already been over this same thing.

[fol. 131] Mr. Cook: I know.

Judge McElroy: I would vote to rule with Judge Windham to sustain the objection on the ground it is a reinquiry into a matter that has heretofore been testified to.

Mr. Cook: We except.

Judge McElroy: Whatever he has done either constitutes a sufficiently legal pledge or doesn't.

Q. I will ask this question: You are aware, are you not, Mr. Blair, you could run for elector as an independent candate under the laws of Alabama?

Mr. Wilkinson: We object to that, if the court pleases.

Judge Windham: Sustain the objection.

Judge McElroy: Sustain the objection.

Mr. Wilkinson: The court holds he is aware of that. He couldn't profess ignorance on it.

Mr. Cook: We except.

That is all.

Mr. Wilkinson: That is all.

(Witness excused.)

COLLOQUY

Judge Windham: Do you have any further testimony?

Mr. Wilkinson: No, sir; I have rested.

Judge McElroy: Does the Respondent have any further evidence to offer?

Mr. Cook: We don't have to reoffer the rule?

Judge McElroy: We will consider those rules.

Judge Windham: Mr. Ray said they were the rules.

Judge McElroy: The rules attached to that answer, the court will take judicial notice they are the existing rules and have been the existing rules of the State Democratic Committee for a considerable number of years.

Mr. Wilkinson: I haven't had time to put it in writing, but I will ask leave to file a traverse of every statement filed by the answer of the defendant.

Mr. Cook: If the Court pleases, we want this understanding. I understand we can amend our answer until the Court [fol. 132] announces a ruling. I haven't had a chance to thoroughly examine this answer. It was drawn hastily yesterday afternoon by four or five of us talking together, and I am not absolutely sure the matter that was presented just now is specifically spelled out in this answer. If it isn't, we would like to have leave to amend it so that it will be within the issues of the case.

Mr. Wilkinson: I would like for him to get all of his answers in before the argument.

We introduced in evidence as Petitioner's Exhibit No. 6 this copy of the brief in the Supreme Court, and by agreement we agreed to eliminate it from the transcript in the event of appeal, and that the Court would take judicial knowledge of the brief on file there. This is the only copy I have, and the Court has some copies, and I would like to have the privilege of withdrawing this for my file.

Mr. Madison: Will Your Honor give either side the privilege of incorporating that brief in full in the record if either side wants it?

Mr. Wilkinson: It is perfectly all right with me.

Judge Windham: Let it show that.

The foregoing was all the evidence in the case.

[fol. 133] February 6, 1952, 9:00 A. M.

Court Reconvened Pursuant to Adjournment

Mr. Wilkinson: If the Court please, I want to file an amendment to the prayer of the petition. This amendment

does not change the body of the petition at all, but I want to get it in before Mr. Cook argues.

The effect of the amendment is that we ask there be included within the writ of mandamus prayed for, a paragraph to the effect that Mr. Ray should proceed with his statutory duties as though the resolution of the State Democratic Executive Committee of Alabama at its meeting held in Montgomery, Alabama, on January 26, 1952, did not contain any reference to the supporting of nominess of the National Convention.

I set out the words in each paragraph, but that is in legal effect a shorthand rendition of it. I think that the matter may possibly be in under the prayer for additional relief and general relief, but in order that the Court——

Mr. Cook: If the Court pleases, we want to object to that for the record on the grounds that it introduces confusion of the issues in the case; it waters down the prayer as originally inserted, and made a part of the petition in that they prayed specifically for a writ of mandamus; whereas, this prayer here would permit him to—that is by him, I mean the respondent, Mr. Ray, to decide for himself whether or not the whole resolution of the committee was sufficient to disbar this petitioner from the party pledged or running as a candidate for Presidential Elector, and leaves him with a discretion, unless otherwise specifically directed by this Court in its order, free to still act in his own way upon his own discretion and determine whether the applicant was entitled to certification as a candidate.

It confuses the issues, and it varies the issues in the original case as made out by the petition, and would leave this man in confusion with regard to what his duties were. [fol. 134] We want to further say that it does not—there is no allegation that the resolution is illegal. There is no allegation that the resolution of the committee is in conflict with the statute.

From aught that appears from the petition the resolution is in conformance with the statute and with the Constitution. He is praying of the Court to tear down the resolution without specifically saying what. He is asking this Court by indirection to void a part of the resolution with-

out the Court directing Mr. Ray as to whether the remaining part is constitutional. It leaves this issue in a state of confusion, and it will not only introduce it in this case, but in other cases as there are bound to be ten other candidates for Presidential Elector.

Judge McElroy: Judge Windham, do you have an opinion on the objection?

Judge Wilkinson, do you want to add something?

Mr. Wilkinson: Yes, sir; I want to call your attention to the theory on which it is filed and the authority supporting it.

If the Court should reach the conclusion it is the duty of Mr. Ray to certify the candidacy of Mr. Blair, then Mr. Blair is entitled to run in a lawful primary, and he is entitled to a lawful ballot in that primary to the end that the primary may not be subject to attack, and we are asking the Court to tell Mr. Ray, in addition to certifying his name, to proceed with his statutory duties as if this language was not in this resolution because the language is in contravention of the statute and in contravention of the constitution of the United States.

Mr. Cook: If the Court pleases, I want to state these further objections, that no predicate is laid in the petition for the relief prayed for by this amendment.

We want to add that it has introduced a new phase in this case, and we want to plead surprise, and it has introduced a new phase in this case which we did not expect, did not anticipate, and had no intention from counsel orally or otherwise, and it is further a part of a plan or pattern of procedure by the petitioner in this case to get a decision ordering Mr. Ray by writ of mandamus to [fol. 135] proceed to certify this man without any ruling on any Constitutional question, State or Federal, that we think ought to be made by the Court on the resolution, and the statutes with reference to whether or not they offend any provision of the Federal Constitution in order that this matter may be properly reviewed.

We want to save our point on that, if the Court please, it being a matter of first impression.

Judge Windham: In that quoted language of the

amended prayer that is now tendered, you started out with——

Judge Wilkinson: I dictated that this morning, and my stenographer could have done better composition, but I think the fact that we made the double quotation does not destroy its legal effect.

Judge Windham: I think that is a much broader proposition than we have tried.

Mr. Wilkinson: I am not offering any additional evidence on it.

Judge Windham: I know.

Mr. Wilkinson: But I want to clear up this mess in one lawsuit if I can, to get rid of it.

Judge McElroy: Judge Wilkinson, I think the general prayer would encompass what you say there.

Mr. Wilkinson: I think that is correct. If you think the general prayer is sufficient, it is all right with me.

Judge Windham: I would like to discuss with my colleague here for a little bit the question of whether or not we allow the amendment. I don't suppose that is determinative at all, but I would like to discuss it with the Judge for a moment.

(Short recess.)

Judge Windham: Gentlemen, we are going to sustain the objection to the amendment for broadening the prayer.

Mr. Wilkinson: We except.

Judge Windham: My colleag-e, Judge McElroy, said something about the fact that the terms of the prayer in the original petition were broad; they were—are broad, they are very broad, but, at the same time, I think it is apparent here that what we have had for trial, and which we, in fact, tried, and no other thing have we tried except [fol. 136] that the one proposition, whether or not the application made by this petitioner to the Chairman and what was said and done and so forth, the payment of his month and so forth, whether those things constituted such a situation as entitles him to have a mandamus issued to the chairman of the Committee directing him to certify him to the Secretary of State in less than forty days before the primary.

Now, is—it is true enough that inherent in that proposition there may be other propositions involved, but except as they are thus involved, we are not going to pass in this case on anything else except that. As I say, in passing on that, it may be true, and probably is true, that there are some other matters that are inherent in it, but except as they are inherent in it, we are not going to pass on anything else except that. I don't believe your petition is capable, certainly not at this time, of being broadened into a proposition of a petition for a declaratory judgment.

Mr. Wilkinson: I didn't ask that.

Judge Windham: Well, I know, but the broad terms of the amended prayer would almost encompass such a matter.

Judge McElroy: In other words, Judge, I am of the opinion, and I think Judge Wilkinson is too, that we could not and would not declare any more under the amended prayer than we would under the petition as originally made, and when I say declare, I mean adjudge.

(The next page follows in proper order.)

[fols. 137-138] Judge McElroy: Of course, the questions that have been here that are now before the Court for decision have been the subject of continuous study and argument of counsel since the very filing of the petition in this case.

We have heretofore expressed a tentative judgment on the main question of law in the case, and we have decided for reasons, which I will ask Judge Windham to state, that a judgment will be rendered in this case awarding the writ of mandamus prayed for in the petition by Judge Wilkinson.

That will obviate the necessity, Judge Wilkinson, of your making any argument in the case, even though you would like to make one. We have so many other things we have to work on, we ask that if you want to make an argument to us in support of a decision which will already have been rendered in your favor, you are privileged to do so in writing.

Mr. Wilkinson: It is terrible to deprive the Democrats of Alabama what I would have to say on this, but they will have to get along without it.

Judge McElroy: Judge Windham will give the opinion of the Court, and if at the end of your statement I feel I should like to say anything in addition, of course, I will have the privilege and will so to add.

(The next page follows in proper order.)

[fol. 139] IN CIRCUIT COURT OF JEFFERSON COUNTY

OPINION

Judge Windham: Well, gentlemen, you realize that this oral statement is one which has not been formulated with any care.

It is given, I think, for the primary reason that I believe counsel on both sides are entitled to know what the reasoning is whereby we have arrived at our conclusions. It is not designed to try to simulate such a thing as a written opinion where the authorities are digested and quoted from. We have looked at and read scores of cases that have come out of the citations made by counsel, and also have come out of those briefs which were filed by respective counsel in the Supreme Court in other cases now pending down there. I doubt whether in this oral summary that I shall concern myself very much with the citation of cases. It is not designed, this statement is not, for that purpose, but primarily, as I say, to acquaint you with the processes of reasoning whereby we have arrived at the conclusion that the writ should be granted.

In the first place, on the threshold of the matter, is the question of whether or not the write prayed for may appropriately be had under the circumstances of the case; that is, under circumstances where the respondent, at the time the petition was filed, had not refused action. I suppose this subject is one upon which much could be said and citations could be made. We have had citations on both sides of the matter.

I think I shall content myself on that subject by saying merely that we are reasonably satisfied from the evidence here on the matter, and from the decisions that have been cited to us, that the requisites do exist for the use of the

writ of mandamus under these circumstances and under the situation as we find it to be.

Now, gentlemen, passing to the next proposition, one which concerns the merits of the case. Of course, you gentlemen have known all the while, and I suppose you probably knew before you even started, that this Court would be bound to give consideration to the Justices as reported in 250 Ala. 399, an opinion rendered in 1948 and having to do with an amendment in 1945 to one of the statutes.

I understand that counsel for the respondent here take [fol. 140] the view that that decision was wrong, and in addition, that it is not binding either on this Court or on the Supreme Court, because of the nature and form of it; that is, an Opinion of several Justices composing the Court given to the Governor in response to his inquiry. Well, we feel this way about it; that we would be a most unusual and exteaordinary two Circuit Judges if we attempted in any wise to overturn the opinions there expressed. That would not be expected of us, and, as we see it, we are bound to give consideration to the statements made in that opinion as being the law, and we do accept it as being the law. If the Supreme Court in its wisdom and upon further consideration should incline to *be* belief that they were wrong in that opinion, that would be their business and not ours.

Now, gentlemen, in connection with that, it has been suggested that that opinion dealt with a situation where one was already elected to the office of Elector, and that it did not apply to, and does not cover the question which we have, namely, a case where one has not been elected, and, in truth, has not even been nominated; but is merely seeking to qualify himself as a candidate in the Democratic Primary for the position of Elector. That question, of course, is one which needs and deserves consideration and thought.

We will attempt to say something on that subject.

However, gentlemen, before we do that, and as relating to the general question of what are the powers of the Elector, and also of the related questions that have been argued here as to whether or not in any wise that situation has changed from the time when the Constitution was

first adopted down until now, and it may be said, perhaps, that that matter goes to the question of whether or not this Opinion of the Justices was correct or not correct; but, at any rate, I will deal with it briefly as I see it, and if my colleague differs from me, he, of course, will say so.

It seems to me to be clear that the Elector is a State Officer in the sense that he is elected by the State, selected or appointed by the State. It seems to be clear that the [fol. 141] Federal Constitution leaves that function to the State, and to the State alone. At the same time, (and I say, in that sense that he is a State officer), but at the same time, the existence of such an office and the functions of such an office, and the purposes of such an office, and the powers and the duties of such an officer, are, of course, dealt with in only one place on the face of the earth, and that is in the United States Constitution. I don't see how there could be any possible dispute about that.

Now then, our Supreme Court has said in this opinion here that such an officer, when elected, has a discretion which cannot be taken away from him, a discretion to vote as that discretion may indicate to him. Some people may say that is all wrong. Some people may say if that is the law, it should be changed, but we are not concerned with those matters.

Our function here, gentlemen, to be plain about it, is to set aside all questions of politics, all questions of what our own personal views may be on politics as far as the human being can do it; our own views as to what we would do with reference to the Electoral System, whether we would like to change it or not to change it—it is our duty to set aside all of those things; and as far as the human being can, on his oath, to look on the question what is the law.

Now then, if that official is to perform functions vested under the Federal Constitution, to do his work and to accomplish an object vested in him under the Federal Constitution, and, even though he be a State Officer, it cannot be gainsaid that the functions he performs are functions vested by the Federal Constitution; that the powers he has are fixed by the Federal Constitution; that his duties are fixed by the Federal Constitution; so I would say, that

being true, that when you come to consider a primary in a State at which such an official is to be nominated by a party, that if the Primary is held under the Laws of the sort and kind which we have in the State of Alabama, then we are compelled, it seems to me, in such cases—such case as that—to accept it as true that the Primary as respects [fol. 142] that matter is an arm of the State Government. The Federal cases so hold.

Now, it has been argued here that those Federal cases deal with the 14th and 15th Amendments, and deal primarily with whether or not there is any implication of this provision or that provision of a state statute which prevents a citizen from voting because of his race or color; but it seem to me to be entirely logical, if you run into a proposition which is concerned in a Primary, a State Primary, and if the matter involved has to do with the Federal Constitution, if the contention be that it is contrary to rights, privileges and powers vested under the Federal Constitution, it seems to me that it makes no difference whether the particular matter is encompassed in the 14th Amendment, the 15th Amendment, the 20th Amendment, or the 1st Amendment, or the main body of the Constitution. This, it seems to me, is exactly the same thing; and we are, therefore, required to consider in this case, as it relates to this matter, that the Democratic Primary in the State of Alabama is an arm of the State, and in that capacity, and as respects that matter, it is not a private undertaking of private citizens.

Now, I had started to say something a while ago about the contention here made, impliedly made, perhaps clearly made, that the original and added provisions of the Constitution which our Court holds gave and granted to an Elector a discretion which cannot be legally taken away from him have been by long usage and custom changed, the implication being that these powers can thus be taken away from him. Well, I don't know of any of the cases cited here which has said that the Constitution may be this amended. It may well be true that where matters in the Federal Constitution are broad and general in their nature, and not clearly defined, that the custom and usages of the

people have justified a certain interpretation being made of them, by our Supreme Court of the United States, which may not have been in consonance with the interpretation originally made of them, but I don't know of any case [fol. 143] which has ever held that certain propositions clearly covered in the Federal Constitution as such, and never amended in the manner fixed by that Constitution, can be amended or diminished or changed by custom of a State, or custom of a people, or a custom of a party, of any other custom; and the truth is that case that has been here cited to us, I believe by counsel for the respondent, of McPherson against Blacker, 146 U. S. 1, was decided before any of those decisions came down from The Federal Courts, holding that such primary as ours was in truth an arm of the state.

It was said in that decision by the Supreme Court of the United States that "It is argued that the district mode of choosing electors, while not obnoxious to constitutional objections, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that, whether choses by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors the original expectation may be said to have been frustrated" (Citation of Cases.)

It does not say that that original independence which the electors had under the Constitution has been lawfully taken away from them, but as I read what he here says, and he is talking about parties before they were held to be arms of the State, he has said that through the usages and practices of the parties the provision has been frustrated. He doesn't say it has been changed lawfully and that the electors no longer have the discretion.

On the contrary, he goes further and says, "But we can perceive no reason for holding that the power confided to the states by the Constitution has ceased to exist because

the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recog- [fol. 144] nize the doctrine that, because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made."

Gentlemen, we are convinced on our part that, if it be true that the Electors, as provided for in the Constitution of the United States in the original provisions, plus the 12th Amendment, had such a discretion and such a power, they still have it insofar as the law is concerned. That is our judgment on that matter.

Now, gentlemen, I am going to turn back a moment to the proposition that has been advanced that the Opinion of the Justices is not applicable because it deals with one already elected, and not with one who indeed, has not been nominated, but is merely trying to qualify himself as a candidate for nomination. As I say, we are bound to regard the Democratic Party, insofar as this mat-er is concerned, as being an agency of the State. Now, it seems to us to be clear that if the State cannot directly and lawfully control the discretion of an Elector, then it cannot indirectly do that. If it cannot lawfully make the Elector, when elected, vote in a certain way, then it seems to us to be clear that neither the State nor any agency of the State, or arm of the State, could lawfully make him promise that he would do that. Now, it would be, in our judgment, a very strange and anomalous thing that a man should hold an office under which by the law he has a discretion and a right to vote as that discretion might indicate, and that at the same time, under the law, there should be a power in the State, or in an agency of the State, whereby he could be so tied that he could not honorably use that discretion. For instance, suppose you had not one party here in the State with a Primary, but you have a half dozen of them and each one chose the same method of proceeding; I think we would all say, as a practical matter, that out of the

nominees of those parties, the one chosen would come. So, [fol. 145] I think, if you could impinge upon his discretion in that fashion, namely, by having an agency of the State tie him beforehand, that is, bind his honor beforehand, that he would vote in a certain manner, you would have destroyed his discretion. We must suppose that all men are honorable men until proved otherwise; we must not suppose that a man can only exercise the right the law gives him by making out of himself a dishonorable man. A man ought to be able to achieve and use the power which the law gives him in full other than becoming a dishonorable man. We have got to suppose if a man gives a pledge he will live up to the pledge. Therefore, we must suppose that the taking of the pledge is efficacious; that is, that it is sufficient, and it is sufficient to control an honorable man, and as I say, we must suppose that all men are honorable, and so, if the discretion that he has cannot be taken from him directly, it cannot be taken from him indirectly by the State or any of its agencies.

Now, I think it is an entirely different thing if one elects to make a choice. Suppose I want to know, and I go to a man and say, here, if I support you, what is going to be your position; will you bind yourself that that is your position? That is an entirely different matter. The voters have a right, an inalienable right, to vote only for those whom they choose and whom they trust, and whom they believe will carry out their will, speaking about it from the standpoint of the voters, and I think that is a wholly different proposition as far as this case is concerned; the difference being, as I have said, we are dealing with an agency of the State who makes the taking of that pledge a prerequisite to his entering in the election contest in the Primary.

Now, gentlemen, I would like to say—I may not have covered that fully enough, but it may be at too great length—I would like to say a few words about the matter which has been mentioned with reference to the statutory power of the Committee to fix the qualifications. I don't know, this may be dicta in this case, but it is my judgment that this provision in the Code means exactly what it says. I think, myself, personally, that the Committee

has got the full power which the statute says that it has, [fol. 146] and it is full and complete, unless it runs counter to or contrary to some provision of the State Constitution or the Federal Constitution or some provision of the State Statutes. I am sure that those who framed that provision there must have had that in mind. It could not have meant that they had themselves more power than the State of Alabama has. No State, no agent of the State, and no citizen has the right, under any argument, to do that which is illegal.

I will say, as a personal opinion and maybe as dicta in this case, that the state committee, as respects officers as to whom the propositions presently referred to are not applicable or in cases where there is no infringement of the State Constitution or Statutes, or the United States Constitution, the committee has the full power to do just what these statutes say it has the power to do.

Now, gentlemen, it has been suggested here that there is matter contained in the pledge filed by the petitioner which makes it impossible for him to secure this writ. I don't know fully just how my colleague has been thinking all the while on that matter. I am willing to say, and do say that matter has given me some considerable cause for study because, in my own experience, it has been a troublesome matter. Of course, the statute says the committee has the power to fix the form of the papers to be filed with the committee in making a declaration of candidacy. I think you would know already, from what I have said would be our holding, that any part in there which is illegal or unlawful would be out. It wouldn't really be in there. The words would be there, but they would be a nullity; if unlawful they would be out; and I don't think it was ever meant, and I don't suppose ever contended, that they could put anything in there that was unlawful. I am speaking about the form.

Now it is stated in here in one part, speaking about pledging himself, that he will aid and support all the nominees in said primary elections, with which we are not involved here, and also, the nominees of the National Convention of the Democratic Party for President and Vice-President of [fol. 147] the United States. That latter part is the part

that we have had in our mind. It is the part, "The nominees of the National Convention of the Democratic Party for President and Vice-President of the United States" which was left wholly out of the papers filed by this Petitioner.

Now, it occurs to me that probably he would have done well to have done no more than merely to have left the words out if that was his choice, and I mean from the standpoint of the question of law involved, just left the words out, but he didn't do that. Instead of that, he put something else in there.

The argument has been made that he has not been and is not authorized to put something else in there and that it was put in there gratuitously and that there is no duty or obligation on the committee to accept that which he put in there. Of course, it must be remembered that the particular Petitioner is attempting to qualify as an Elector, and that his sole function and duty officially are to cast a vote for President and Vice-President of the United States. That is his sole position, when and if elected.

Now, of course, the part that he strikes out would be a commitment upon his part that he would aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, and I might turn aside to say that although that doesn't say anything about voting for them, I think, the terms there used are broader than the mere term "to vote for", and I think that those terms inevitably include the proposition of voting for them, because it seems to me, that an unqualified pledge to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States as to one nominated and elected as Elector would inevitably include the obligation to vote for them, because, for an Elector to say, "I have done everything in the world for them except vote, when my sole business for which I was elected was to vote" would be forty times crazy. For one to say he had aided and supported them if he hadn't voted for them, would be inconceivable, because "voting" is his business.

[fol. 148] Now, the question I am considering is whether or not he was justified in putting something else in there.

Well, it is our judgment that since the pledge as tendered to him included words about aiding and supporting the nominees of the Democratic Party for President and Vice-President of the United States, and since it was that part which he left out, our conclusion is that the added words do not make the papers unacceptable. He put in there, instead of that part stricken, a very succinct and compressed statement of what his position was on that very subject which he left out. It doesn't deal with some extraneous proposition, but it deals with the very matter which he left out. I might say that we have also considered this subject—that it has been suggested if he cannot be compelled to take a pledg he had no right to take a pledge. I think those are entirely different things.

A candidate for Elector has a right to make up his mind the day he announces as to certain principles or certain men. He has a right to commit himself to that either in writing or orally, but the question of making him do that we conceive to be an entirely different thing. On account of the circumstances, gentlemen, it is our judgment that that inclusion of that provision does not make the paper tendered unacceptable.

There is one other thing I want to make a comment on. It has been suggested the subject at hand is purely a political matter and the Court has no jurisdiction over it. The Court realizes that on political matters as such, and as such alone, it has no right to say anything or to do anything, but the Court is of the opinion that if a question of law arises, a man's constitutional right, for instance, under The State or The Federal Constitution, if a question of law arises, a man's constitutional right (I just take that as an illustration; I don't mean to say a constitutional right alone, just take that as an illustration) whether it arises out of the field, or arises out of business, or arises out of an election, whatever it might arise out of, this Court believes that in such a case the Court has the duty and the authority to pass on the matter. The Court has no right to engage in politics or support one view in politics over another view in poli-
[fols. 149-150] tics, but the Court does have the power and the duty, in proper cases, to pass on rights where legal

Page

Opinion of the Justices, 250 Ala. 399, 34 So. 2d 598 (1948) 16
Seay v. *Latham*, 143 Tex. 1, 182 S. W. 2d 251 (1944) ..9, 27
Smiley v. *Holm*, 285 U. S. 355, 369 (1931) 19
Smith v. *Allwright*, 321 U. S. 649 (1944) 28
Snowden v. *Hughes*, 321 U. S. 1, 7 (1944) 29
Spreckles v. *Graham*, 194 Cal. 516, 531, 228 P. 1040 (1924) 13, 21
State ex rel. Hawke v. *Myers*, 132 O. St. 18, 4 N. E. 2d 397 (1936) 19
State ex rel. Nebraska Republican Committee v. Wait, 92 Neb. 313, 138 N. W. 159 (1912) 9, 12, 20
Stuart v. *Laird*, 1 Cranch 299 (1803) 20
Thomas v. *Cohen, et al.*, 146 Misc. 835, 262 N. Y. S. 320 (1933) 19
Tyler v. *The Judge*, 179 U. S. 405 (1900) 30

STATUTES:

California Election Code, Section 10555 ..... 10, 18
Oregon Code, Section 81-503(a) 10, 19
Title 17, Sections 336, 347, 345, 344, 348, 350, 388, Code of Alabama 1940 ..... 5, 14, 15
28 U. S. C., Section 1257(3) 2

MISCELLANEOUS:

43 L. R. A. (N. S.) 284, 287 22
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Thayer, *Legal Essays*, p. 158 (1908) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NO. .....

BEN F. RAY, AS CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, *Petitioner*,

v.

EDMUND BLAIR, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama, entered in the above-entitled case on February 29, 1952, affirming a judgment of the Circuit Court of Jefferson County, Alabama.

OPINIONS BELOW.

The opinion of the Circuit Court of Jefferson County, Alabama (R. .....) is unreported. The opinion of the Supreme Court of Alabama (R. .....) is not yet reported.

JURISDICTION.

The judgment of the Supreme Court of Alabama was entered on February 29, 1952. (R. .....) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Petitioner in the court of first instance and in the Supreme Court of Alabama contended that respondent had not adequately presented in his pleadings the question of whether or not the action of the State Democratic Executive Committee of Alabama violated the Federal Constitution. Nevertheless, the federal question was fully argued at each stage of the litigation below, and both courts below based their judgments squarely on a federal question,—holding that the action complained of violated Article II, Section 1 and the Twelfth Amendment of the United States Constitution. The Alabama Supreme Court stated (R. . .) :

> "The theory on which the petitioner claims the right to become a candidate in the primary without taking the prescribed oath is that the Twelfth Amendment, supra, gives electors therein provided for the right to be free to vote for a president and vice-president of the United States without compulsion on the part of any organization or authority. That said right of freedom in that respect is a constitutional right. Therefore, the State Democratic Executive Committee has no power to require them to forego that right of freedom as a condition to become a candidate in the primary held pursuant to the laws of the State of Alabama."

That Court explicitly based its decision solely upon a determination of the federal question (R. .....) :

> "So that the decisive inquiry here is whether the Twelfth Amendment confers on electors freedom to exercise their judgment in respect to voting in the electoral college for a president and vice-president."

Further (R. .....) :

> "The question is a federal one, and there has been no authoritative pronouncement as to it. So that we are free to apply the plain logic of the situation, which is the plain meaning of the Twelfth Amendment."

QUESTIONS PRESENTED.

1. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a state, by legislative or administrative action, or by a combination of legislative and administrative action, from requiring presidential electors to cast their electoral votes for President and Vice-President of the United States for the candidates of the political party under the auspices of which the electors were elected?

2. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a political party from requiring its candidates for presidential elector, as a condition for seeking primary nomination as such candidates, to pledge that if elected they will vote for the presidential and vice-presidential nominees of the party?

Conversely, do those provisions of the Federal Constitution require that a political party permit a person to become a candidate for the party's nomination for presidential and vice-presidential electors, even though that person states that if elected he will *not* cast his electoral ballot for the party's nominees for President and Vice-President?

3. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution create constitutionally protected and legally enforceable rights in favor of a person seeking primary nomination as candidate for presidential elector?

4. Has the Supreme Court of Alabama correctly interpreted and applied Article II, Section 1, and the Twelfth Amendment of the United States Constitution?

STATUTES INVOLVED.

The relevant statutory provisions are printed in Appendix "A", *infra*.

STATEMENT.

Respondent petitioned the Circuit Court of Jefferson County, Alabama, for mandamus to command petitioner, as Chairman of the State Democratic Executive Committee, at least forty days prior to May 6, 1952, to certify respondent to the Secretary of State of Alabama as a candidate for presidential and vice-presidential elector in the Democratic primary election to be held May 6, 1952. (R. .) The petition showed that a resolution of the State Democratic Executive Committee of Alabama, adopted January 26, 1952, set out the exact language of the declaration of candidacy to be submitted by persons seeking to become candidates in the 1952 primary. The declaration is as follows:

> "I hereby declare myself to be a candidate for the Democratic nomination (or election) in the primary elections to be held on Tuesday, the 6th day of May, 1952, and on Tuesday, the 3rd day of June, 1952, for the office of . I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the *Democratic Party*, or for any one other than the nominees of the *Democratic Party*, or any ticket other than the *Democratic ticket*, or *openly and publicly in said general election oppose the election of the nominees of the Democratic Party*, or any of them. I further agree to abide by the result of the primary elections in which I am a candidate and I do pledge myself to aid and support all the nominees in said Primary Elections, *and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States.* I further certify that I am a qualified elector of the State of Alabama and possess the qualifications fixed by law for the office for which I am a candidate, and if a candidate for the Democratic nomination for Judge of a Court of Record, I do further certify that at the time of filing this declaration of candidacy, I am not under disbarment or suspension." (Emphasis supplied.)

The declaration of candidacy filed by respondent departed from the prescribed form in several particulars. Principally, respondent omitted entirely the pledge required of all candidates to aid and support "the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."* Respondent inserted the following statement in his sworn declaration of candidacy:

> "I will not cast an electoral vote for Harry S. Truman or for any one who advocates the Truman-Humphrey Civil Rights Program."

The Circuit Court forthwith ordered petitioner to appear and show cause why a writ of mandamus should not issue commanding him to certify appellee as prayed. (R. .) After hearing, that court issued a peremptory writ of mandamus ordering respondent's certification not less than forty days prior to the primary elections to be held on May 6, 1952. (R. .)

At the Circuit Court hearing, respondent, when asked whether, if elected as a presidential elector, he was willing to aid and support the nominees of the 1952 National Convention of the Democratic Party, replied to the effect that he would not support President Truman or anyone sponsored by President Truman or anyone who supported "anti-South" legislation. (R. .) When asked whether he was willing to vote for General Eisenhower or other potential Republican nominees for President, respondent answered that he "didn't know," that he might not cast his vote at all in the electoral college that he might resign so

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* The basic Alabama statute (Alabama Code, Title 17, Section 347) provides that "Every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein . . ." Pursuant to this statute, the Alabama Democratic Executive Committee adopted a resolution setting forth qualifications for candidacy in the Democratic primary, including the pledge to support the party's nominee for President and Vice-President, already referred to above.

another could vote in his stead. In response to further questions, he replied that he did not know what he would do if elected, but that his purpose was to oppose any candidate advocating an "anti-South" program.

The Circuit Court judges indicated that their judgment was based solely on the ground that the Committee's qualifications for Democratic primary candidates for presidential elector violated Article II, Section 1, and the Twelfth Amendment of the Federal Constitution, in that a restraint was imposed on the free exercise of discretion in casting an electoral ballot.

On appeal, the Alabama Supreme Court affirmed, (R.) holding that the Committee pledge violated Article II, Section 1, and the Twelfth Amendment of the Federal Constitution. The Court reasoned that these constitutional provisions conferred upon presidential electors a right to exercise free and unfettered votes for President and Vice-President, without regard to the nominees of the National Conventions. The Court held that these constitutional sections prohibited the Democratic Party from requiring a pledge from persons attempting to run in a Democratic primary for nomination as Democratic candidate for presidential and vice-presidential electors to cast their electoral ballots for the nominees of the Democratic National Convention. And the Court further held that Article II, Section 1, and the Twelfth Amendment of the Federal Constitution created legally enforceable and constitutionally protected rights in the electors themselves. (R. .)

Two justices of the Alabama Supreme Court dissented, (R. .) stating that even if candidates for presidential electors, after election, may have a right to cast a free and unpledged electoral ballot, the Twelfth Amendment guarantees them no right to go to the electoral college by any certain primary election route.

Both lower courts apparently recognized the statutory powers of the Democratic Executive Committee to fix political and other qualifications as a prerequisite for par-

ticipation in the Democratic primary as a candidate or as a voter. But because of supposed Federal constitutional proscriptions, the lower courts denied the existence of such powers where elector-candidates are concerned.

There is extreme urgency in this case. Petitioner has been ordered to certify respondent to the Secretary of State of Alabama as a candidate for elector in the May 6, 1952, primary, on or before March 27, 1952. Petitioner does not urge a prompt decision in this Court out of fear of mootness, if the case is decided before the November election, but in order to avoid confusion and uncertainty as to the legal status of those primary candidates who have not met the Committee's qualifications. If this Court grants certiorari and upholds the Committee's elector-candidate qualifications, those candidates who have not pledged themselves in accordance with the Committee requirements will not appear legally on the primary ballot, nor can they be legal nominees of the primary elections.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Alabama erred:

1. In holding that Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a state, legislatively or administratively, or by a combination of legislative and administrative action, from requiring presidential electors to cast their electoral votes for President and Vice-President of the United States for the candidates of the political party under the auspices of which the electors were elected.

2. In holding that Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a political party from requiring its candidates for presidential electors, as a condition for seeking primary nomination as such candidate, to pledge that if elected they will vote for the presidential and vice-presidential nominees of the party.

3. In holding that Article II, Section 1, and the Twelfth Amendment of the United States Constitution require that a political party permit a person to become a candidate for the party's nomination for presidential and vice-presidential elector even though that person states that he will *not* cast his electoral ballot for the party's presidential and vice-presidential nominees.

4. In holding that Article II, Section 1, and the Twelfth Amendment of the United States Constitution create constitutionally protected and legally enforceable rights in favor of a person seeking primary nomination as candidate for presidential elector.

5. In holding that a person seeking primary nomination as a candidate for presidential elector has legal standing to invoke a judicial determination of whether or not such electors may be pledged to cast their ballots for the presidential and vice-presidential nominees of the political party whose endorsement they carry.

6. In holding that the action of the State Democratic Executive Committee of Alabama deprived respondent of any Federal constitutional right.

7. In affirming the judgment of the Circuit Court of Jefferson County, Alabama.

REASONS FOR GRANTING THE WRIT.

In the application for stay which was filed on March 10, 1952, the reasons for granting the writ of certiorari were summarized as follows:

> "*First:* The case involves the constitutionality, under the Federal Constitution, of a procedure carrying out a state statute.
>
> "*Second:* The question decided below has not heretofore been decided by this Court.
>
> "*Third:* The decision below conflicts with, and jeopardizes, the historic policy of the Constitution and

of this Court to commit to the State legislatures the procedure for the selection of electors.

"*Fourth:* The decision of the Alabama Supreme Court conflicts with the election procedure established by statute in at least 21 states.

"*Fifth:* The decision below conflicts with the procedure which has been established for more than 150 years and approved by this Court, whereby the electors perform a mere ministerial act, as agents of the voters who choose them, when they cast their ballots for President and Vice-President."

While the five reasons for granting certiorari enumerated above speak for themselves, a few detailed aspects of the matter merit further discussion.

1. The decision of the court below in the instant case is not in accord with statements of this Court interpreting and applying Article II, Section 1, and the Twelfth Amendment of the United States Constitution. In *In Re Green*, 134 U. S. 377, 379 (1890), this Court said:

> "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice-President of the nation."

In *McPherson* v. *Blacker*, 146 U. S. 1, 36 (1892), holding that Michigan could constitutionally provide that electors were to be selected by popular election in districts, this Court stated that electors are chosen "simply to register the will of the appointing power in respect of a particular candidate." And: "In relation, then, to the independence of the electors the original expectation may be said to have been frustrated." (ibid.) This Court added that ". . . the Constitution has been found in the march of time sufficiently applicable to conditions not within the minds of its framers and not arising in their time. . . ." (ibid.)

The decision below is in direct conflict with the decision of the highest court of Nebraska in *State ex rel. Nebraska*

Republican Committee v. *Wait*, 92 Neb. 213, 138 N. W. 159 (1912). That court affirmed an order to the Nebraska Secretary of State to remove from the Republican column on the ballot electors pledged to Roosevelt, and to replace them with electors pledged to Taft.

The decision below conflicts directly with the decision of the highest court of Texas in *Seay* v. *Latham*, 143 Tex. 1, 182, S. W. 2d. 251 (1944). Here, after the Texas Democratic Convention had replaced previously nominated elector candidates opposed to Roosevelt and Truman with favorable elector candidates, mandamus issued to the Texas Secretary of State to compel a cancellation of the prior certification and a similar replacement.

The decision below conflicts inferentially with other state court decisions which will be cited, *infra*.

The decision below conflicts directly with the statutes of California (California Election Code, Sec. 10555) and Oregon (Oregon Code, Sec. 81-503(a) requiring electors to vote for their party's presidential and vice-presidential nominees.

The decision below conflicts with the statutes of twenty-one states which direct that the names of elector candidates be omitted entirely from the ballot. See, Appendix B.

Since the decision below squarely conflicts with what appears to be a uniform legislative and judicial interpretation of the meaning and effect of Article II, Section 1, and the Twelfth Amendment of the Federal Constitution, a definitive ruling herein from this Court is imperative.

2. The Supreme Court of Alabama has declared that the Constitution of the United States guarantees absolute discretion to presidential and vice-presidential electors to cast their electoral vote for anyone they please. And the Supreme Court of Alabama has held that by constitutional command this discretion may not be restricted by a political party even to the extent of exacting a pledge from persons seeking to become candidates for elector in the party's primary that if elected they will support the party's nominees for President and Vice-President.

The Supreme Court of Alabama has decided the question in a way that runs counter to more than one hundred and fifty years of custom and tradition in the nomination and election of presidential electors.

> "Political parties have made the nominations since 1792, and the presidential electors merely register the will of the state pluralities. That they should do so is now an unwritten convention quite as strong as any provision of the written constitution; and although some state legislatures appointed presidential electors as late as 1860, a popular vote has become the accepted and universal method. It is interesting to note that in this one department where the Federal Convention was largely without experience, it created a clumsy system which had to be supplemented by the Twelfth Amendment and by the intervention of political parties." 1 Morison and Commager, *Growth of the American Republic*, p. 291.

To the same effect, see, 2 Story, *Constitution*, 5th Ed., p. 312; *In Re Green*, 134 U. S. 377, 379 (1890).

For more than a century and a half the voters of this country have registered, ~~in effect, a direct~~ choice for President and Vice-President of the United States. Electors have consistently and uniformly done no more than reflect the wishes of the parties under whose auspices they have run. This tradition is so well established that in twenty-one of the states of the United States electors' names do not appear on the ballot; the voter marks his ballot for the actual presidential and vice-presidential nominees. (See Appendix B.)

The decision of the Supreme Court of Alabama takes from the voters this awesome power of electing the President and Vice-President of the United States, and holds that this power is in the electors to be exercised absolutely, without requisite response to the registered will of the voters. The decision holds, moreover, that any restraint on the unbridled discretion or caprice of the individual elector is forbidden by the Constitution of the United States.

This decision below, placing a novel judicial construction on Article II, Section 1, and the Twelfth Amendment of the United States Constitution, effects a profound change in the relationship of the voters of this country to the highest elective offices in the land. Every decision of the highest court of a State interpreting the Federal Constitution has repercussions that are nation-wide. But since the decision of the Alabama court affects solely the election of the President and Vice-President of the United States, the Alabama decision has as direct and as vital effect on the voters of Oregon or Massachusetts as on the voters of Alabama. It is a truism that in the election of President and Vice-President, the electoral votes of one state are equally important to those interested in the election as are the same number of electoral votes from any other state. This Court should not permit the novel and sweeping decision below to stand without review.

The practical consequence of permitting electors to vote as they please without regard to the political parties under the auspices of which they run was considered by the Supreme Court of Nebraska in *State ex rel. Nebraska Republican Committee* v. *Wait*, 92 Neb. 313, 138 N. W. 159 (1912). The Nebraska court stated at page 162:

> "By the acceptance of that nomination at the hands of persons 'affiliating with the Republican Party,' they (electors) pledged themselves to discharge their duties, if elected, by voting for the candidates for President and Vice-President who should be subsequently nominated by the national convention of that party. We are all agreed that any other construction would be farcical."

Moreover, if the decision of the Alabama Supreme Court is correct, then the average voter can have no assurance as to how the electors for whom he may vote will cast their electoral ballots. In the words of the Nebraska Court in the *Wait* case at page 165:

> "By far the greater number of voters do not know the various candidates for electors; but they do know

for whom they want to vote for President and Vice President. They have been in the habit in the past of voting a straight ticket, and particularly so for presidential electors. It is rare, indeed, that a voter 'scratches' that part of his ticket. He votes for entire strangers about whom he has never read, or made inquiry, because of the fact that they stand for the candidates whose election he desires. To deprive the voters who desire to vote a straight Republican ticket of the opportunity of doing so, and at the same time afford such opportunity to the voters of the other parties named, would be repugnant to every sense of honor, and would be in defiance of the just rule that important privileges and partisan advantages cannot be conferred upon one class and denied to another class by hampering it with unfair and unnecessary burdens and restrictions.'

And to the same effect see *Spreckles* v. *Graham*, 194 Cal. 516, 531, 228 P. 1040 (1924).

A consideration of the State of New York demonstrates the impracticality of the Alabama Court's construction of the Constitution and its sweeping effect if regarded as the law of the land. Under the Alabama Court's interpretation of the Constitution, the New York voter cannot be sure that a candidate for elector will cast his electoral ballot for the presidential nominee of the elector's party. It would be incumbent on the New York voter to inquire into the personal political backgrounds of all the candidates to determine which forty-seven candidates for elector would probably cast their electoral ballots for the voter's choice for President and Vice-President. The vast majority of the voters of this country would be shocked to learn that the Constitution of the United States prevents their getting binding assurances from candidates for elector that they will vote for the nominees of their party.

The Alabama Supreme Court's decision has a profound effect not only on the voters but on political parties in this country. Petitioner submits that the decision of the Alabama Supreme Court greatly weakens the party system in

this country and leaves political parties less able to perform their vital role in our form of government. The minimum requirement for effective party government would seem to be that candidates who seek to run as electors in a party primary pledge themselves to vote for the choice of the party if elected. In many states it is apparently assumed that all candidates who seek the party's nomination for elector will cast their ballot for the presidential nominee of the party. The decision below in holding unconstitutional the effort of the party to articulate this pledge has struck at the basis of the silent assumption as well as the pledge itself. Moreover, the requirement of the pledge was instituted by the State Democratic Executive Committee on the strength of an Alabama statute expressly conferring on the Committee "the right, power and authority to fix and prescribe the political or other qualifications of its own members, and . . . who shall be entitled and qualified to vote in such primary election, or to be candidate therein . . . ." Alabama Code, Title 17, Section 347. The pronouncement by the Supreme Court of Alabama that Article II, Section 1, and the Twelfth Amendment forbid a political party from placing any restraint on those who seek to run for elector under its auspices should not go unreviewed by this Court.

3. The decision of the court below is believed to be erroneous. The decision probably conflicts with applicable decisions of this Court; it directly conflicts with judicial decisions and legislative acts of several states; it is at war with the uniform interpretation of Article II, Section 1, and the Twelfth Amendment of the Federal Constitution by constitutional writers and historians; and it is contrary to the traditional and continuous operation of the electoral system almost since its inception.

Petitioner will elaborate on the errors below in the succeeding section of this petition.

ARGUMENT.

A.

The court below has erroneously interpreted and applied Article II, Section 1, and the Twelfth Amendment of the Federal Constitution. The decision below is discordant with decisions of this Court and of other courts, with legislative enactments, and with long standing custom and tradition in this country.

The Alabama holding effectively deprives the voters in that state of the opportunity of effective choice of a President of the United States. Electorates in all other states are also directly affected in this regard. And the efficacy of the two-party system is dangerously imperiled.

Article II, Section 1, and the Twelfth Amendment grant plenary power to the State legislatures to appoint electors. *McPherson* v. *Blacker*, 146 U. S. 1 (1892). This Court there held that legislatures had been given the exclusive method of effecting the object; that the Constitution gave the legislatures broad discretion, not only as to the mechanics of appointment, but as to the qualifications which the electors themselves must have.

Alabama's Democratic electors are nominated by primary election. This is not compulsory, but a matter for determination by the governing body of the party. Title 17, Section 336, Code of Alabama 1940. That body may set political and other qualifications for primary participation as voter or candidate. Title 17, Section 347, Code of Alabama. A candidate in a primary election must be eligible to vote and politically qualified in order to secure a place on the ballot. Title 17, Section 345, Code of Alabama. The Committee Chairman must certify the names of candidates to the Secretary of State forty days prior to the primary election. Title 17, Section 344, Code of Alabama. But he is to receive and certify only declarations of candidacy "in the form prescribed by the governing body of the party." Title 17, Section 348, Code of Alabama. (There is

questions are involved, whether they arise here, there or elsewhere.

Do you wish to add anything, Judge McElroy?

Judge McElroy: No, sir, Judge, not a thing.

[fols. 151-152] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 153-154] IN CIRCUIT COURT OF JEFFERSON COUNTY

CLERK'S CERTIFICATE

THE STATE OF ALABAMA,
Jefferson County.

Circuit Court, Tenth Judicial Circuit of Alabama

I, Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing pages numbered from one to forty-seven, both inclusive, contain a full, true, correct and complete transcript of all proceedings in this Court; that pages numbered from forty-nine to One Hundred and fifty-one, both inclusive contain a transcript of evidence together with all proceedings thereon, as filed in this office, all being in a cause wherein Edmund Blair is Petitioner and Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama is Respondent.

I further certify that on the 7th day of February, 1952 the Respondent prayed for and obtained an appeal to the present term of the Supreme Court of Alabama; and that Ben F. Ray as Chairman of the State Democratic Executive Committee of Alabama is principal and National Surety Corporation is surety for all costs and that said surety has in writing waived its right to claim personal property as exempt under the laws of the State of Alabama, all of which appears of record in this Court, and all of which I hereby certify to the Clerk of the Supreme Court of Alabama.

Witness my hand and seal of said Court this the 16th day of February, 1952.

/s/ Julian Swift, Clerk of the Circuit Court of the Tenth Judicial Circuit of Alabama.

[fol. 155] IN THE SUPREME COURT OF ALABAMA, SIXTH DIVISION

BEN F. RAY as Chairman of State Democratic Executive Committee of Alabama (Respondent), Appellant,

vs.

EDMUND BLAIR (Petitioner), Appellee

APPELLANT'S ASSIGNMENTS OF ERROR

Now comes the Appellant (Respondent), Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, and says that there is manifest error in the record in this cause committed by the Court below in the trial of this cause, and Appellant sets down and assigns the following assignments of error, separately and severally to the rulings, orders and judgment of the court below:

1. The Court below erred in overruling Appellant's (Respondent's) motion to quash the summons issued to the Respondent by the Clerk of the Court below whereby respondent was summoned to appear and answer Appellee's Petition for Mandamus as last amended (for said Summons, see Pp. 2, Transcript; Motion, P. 15, Transcript; for said order, see Pp. 43, Transcript.)

2. The Court below erred in overruling Appellant's (Respondent's) motion to quash the Order issued by the Court below commanding Appellant to appear and show cause on February 2, 1952, why a Writ of Mandamus should not issue against Appellant as prayed for in Appellee's petition therefor as last amended (for said Order, see Pp. 11, Transcript; for said Motion, see Pps. 15, 16, Transcript; for said Order of Court see Pp. 43, Transcript).

3. The Court below erred in overruling Appellant's (Respondent's) demurrer to Appellee's petition as last amended

(for said Petition see Pps. 2-11, 16, Transcript; for said Demurrer see Pps. 19-30, Transcript; for said Order and Judgment, see Pp. 44, Transcript).

4. The Court below erred in awarding a Writ of Mandamus in favor of the Appellee (Petitioner) and against the Appellant (Respondent); (For said Order and Judgment, see PPs. 44-46, Transcript).

5. The Court below erred in finding that the Petitioner (Appellee) was entitled to the relief prayed for against Appellant (Respondent); (Page 44, Transcript).

6. The Court below erred in sustaining objection of Appellee's attorney to the following question propounded to [fol. 156] the witness Edmund Blair, by Appellant's attorney, to which ruling of the Court Appellant duly and legally excepted:

"And so this letter you wrote him here, and which you have set out in your sworn petition, was window dressing to lay a condition precedent to filing your writ of mandamus?" (Transcript, Pp. 77)

7. The court below erred in sustaining objection to Appellee's attorney to the following question propounded on cross examination by Appellant's attorney to the witness, Edmund Blair, to which ruling of the Court Appellant duly and legally excepted.

"Q. Now, Mr. Blair, are you willing to vote a ballot in the 1952 Democratic primary containing the pledge set out in the resolution of the Democratic Committee adopted on January 26, 1952——

Mr. Wilkinson: We object to that, if Your Honor please, incompetent, irrelevant, and immaterial; has nothing to do with the issues in this case.

"Q. —which pledge is as follows:

"By casting this ballot I do pledge myself to abide by the results of this primary election and to aid and support all the nominees thereof in the ensuing general elections. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States." (Transcript Pp. 79)

8. The Court below erred in sustaining objection of Appellee's attorney to the following question propounded by Appellant's attorney on cross examination to the witness, Edmund Blair, to which ruling of the Court Appellant duly and legally excepted:

"Q. Now, let me ask you this: Are you willing to answer questions to Mr. Ben Ray or to the State Democratic Executive Committee as a whole concerning said touching your qualifications to vote in the 1952 Democratic Primary?" (Transcript Pp. 88.)

9. The Court below erred in permitting Appellee to in-
[fol. 157] troduce in evidence in this cause as Petitioner's (Appellee's) Exhibit No. 6, a brief which was filed in the Supreme Court of Alabama by Appellant in another case which was on appeal in said Court, styled "Horace C. Wilkinson, Appellant, against the State Democratic Executive Committee and Ben F. Ray, Appellee, Sixth Division No. 366" to which ruling of the Court Appellant duly and legally excepted. (Transcript Pp. 95-97).

10. The Court below erred in overruling Appellant's objection to the following question propounded by Appellee's attorney to the witness, Ben F. Ray, and to requiring the said Ben F. Ray to answer said question, to which rulings of the Court Appellant duly and legally excepted:

"Q. Will you tell the court now whether or not you intend to certify Mr. Blair's declaration of candidacy for Presidential and Vice-Presidential Elector to the Secretary of State?

"A. I decline to answer unless the court requires me." (Transcript Pp. 101, Ruling 107.)

11. The Court below erred in overruling objection of Appellant's attorney to the following question propounded by Appellee's attorney to the witness, Ben F. Ray, and to the order of the Court requiring said Ray to answer said question, to which order and ruling of the Court Appellant duly and legally excepted:

"Q. I will ask you to state to the court whether or not you intend to certify to the Secretary of State in less than 40 days before the primary that Edmund Blair is a candi-

date for nomination for Presidential and Vice-Presidential Elector?

"A. In answer to that question, and at the requirement of the Court, I will state under the circumstances I will not approve it until ordered to do so by the Court." (Transcript, 107-108).

12. The Court below erred in sustaining objection of Appellee's attorney to the following question propounded by Appellant's attorney to witness, Edmund Blair, on Re-cross Examination, to which ruling of the Court Appellant duly and legally excepted:

"Q. Yes, sir; are you willing to now pledge to us to aid and support the nominees of the National Convention of [fol. 158] the Democratic Party for President and Vice-President of the United States in 1952." (Transcript Pp. 128.)

13. The Court below erred in sustaining objection of Appellee's attorney to the following question propounded by Appellant's attorney to the witness, Edmund Blair, on Recross Examination, to which ruling of the court Appellant duly and legaliy excepted:

"Q. Are you willing as such voter to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States in 1952?" (Transcript 129.)

14. The Court below erred in making pronouncement of the law to the effect that the Democratic Party Primary in Alabama "is an arm of the State government", and that the State Democratic Executive Committee of Alabama is an arm of the state government, which pronouncement was made by the Court below at the time said Court rendered judgment awarding Appellee a writ of mandamus, and which pronouncement constituted a finding of the Court below:

". . . when you come to consider a primary in a State at which such an official is to be nominated by a party, that if the Primary is held under the laws of the sort and kind which we have in the State of Alabama, then we are com-

pelled, it seems to me, in such cases—such case as that—to accept it as true that the Primary as respects that matter is an arm of the State Government." (Transcript, Pps. 141, 142).

15. The Court below erred in finding that the Constitution of the United States "gave and granted to an (Presidential and Vice-Presidential) Elector a discretion which cannot be legally taken away from him". (Transcript Pp. 142).

16. The Court below erred in finding that the qualifying oath required by the State Democratic Executive Committee by its resolution of January 26, 1952, was repugnant to and violated the Constitution of the United States insofar as it required persons desiring to qualify as candidates for Presidential and Vice-Presidential Elector to swear that they would aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President in 1952. (Transcript 139-149).

[fol. 159] 17. The Court below erred in finding that the provision of the qualifying oath required of persons seeking to become candidates in the Democratic Primary of Alabama in 1952, by the State Democratic Executive Committee of Alabama in its resolution of January 26, 1952, that such persons as a condition to the becoming candidates in such primary agree to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President in 1952, violated rights of Appellee guaranteed under the Constitution of the United States to have unfettered discretion in casting his votes for President and Vice-President of the United States if elected as a Presidential and Vice-Presidential Elector. (Transcript, Pp. 139-149).

18. The Court below erred in finding that the Appellee had a right to make the gratuitous additions, amendments, and insertions which he made to the qualifying oath required by said Committee of candidates seeking to enter the Alabama Democratic Primary of 1952 without the authority or consent of said Committee. (Transcript, Pp. 146-148).

19. The Court below erred in granting the writ of mandamus to petitioner, Edmund Blair, requiring Ben F. Ray, as

Chairman of the State Democratic Executive Committee, to certify to the Secretary of State petitioner as a candidate for Elector. Said error consisted in one or more of the following:

a. The Court did not have jurisdiction of the cause.

b. The writ of mandamus was prematurally issued.

c. The writ foreclosed the State Democratic Executive Committee from deciding the qualifications and eligibility of said Blair to be certified as a candidate, and also from performing other duties wholly within the Committee's jurisdiction.

d. The said declaration of candidacy of said Blair was not in the form preseribed by the State Committee.

e. No part of the declaration of candidacy prescribed by the State Committee as to an Elector violates either Article 2, Section 1, Clauses 2 and 3, or the Twelfth Amendment or any other provision of the Constitution of the United States.

f. The writ foreclosed the Respondent Ray, as Chairman of the State Democratic Executive Committee from deciding whether or not the declaration of candidacy of petitioner Blair was in fact true.

Harold M. Cook, James J. Mayfield, Attorneys for appellant.

[fol. 160] IN THE SUPREME COURT OF ALABAMA

[File endorsement omitted]

[Title omitted]

ARGUMENT AND SUBMISSION— February 21, 1952

Come the parties by attorneys and argue and submit this cause for decision.

The Supreme Court adjourned until Monday, February 25, 1952, at 10 o'clock, A.M.

[fol. 161] IN THE SUPREME COURT OF ALABAMA

BEN. F. RAY, as Chairman of the State Democratic Executive Committee of Alabama

v.

EDMUND BLAIR

Appeal from Jefferson Circuit Court

OPINION—February 29, 1952

LIVINGSTON, Chief Justice.

This is an appeal by Ben F. Ray as Chairman of the State Democratic Executive Committee from an order entered in the Circuit Court of Jefferson County, Alabama, on the 6th day of February, 1952, awarding the appellee a writ of mandamus directed to the said Ben F. Ray as Chairman of the State Democratic Executive Committee [fol. 162] of Alabama ordering, directing and commanding him to certify to the Secretary of State of Alabama, not less than forty days prior to May 6, 1952, the name of Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in the primary election of the Democratic Party to be held on May 6, 1952.

On January 26, 1952, the State Democratic Executive Committee of Alabama held a meeting in Montgomery, Alabama, and adopted a resolution in which it prescribed a form for declaration of candidacy to be filed with the Chairman of the Committee as prescribed in Title 17, Section 348 of the Alabama Code of 1940.

The Committee incorporated in this form the following: "* * * I further agree to abide by the result of the primary elections in which I am a candidate and I do pledge myself to aid and support all of the nominees in said primary elections, and *also the nominees of the National Convention of the Democratic Party for president and vice-president of the United States.*"

Mr. Blair struck the underscored portion of the foregoing pledge from the declaration of candidacy filed with the Chairman.

In the form prescribed by the Committee, it was provided that the candidate for nomination should swear, "I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket, or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for any one other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket, or openly and publicly in said general election oppose the election of the nominees of the Democratic Party, or any of them." * * * "

[fol. 163] Mr. Blair added the words "in Alabama" after the words "Democratic ticket" and after the words "Democratic Party" where the words appear in the proposed form of declaration of candidacy.

After striking out the sentence which would pledge him to support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, Mr. Blair inserted in the declaration of candidacy filed with the Chairman these words: "But I will not cast an electoral vote for Harry S. Truman or for any one who advocates the Truman-Humphrey Civil Rights Program."

After an extended hearing covering several days the trial court ruled that the portion of the proposed pledge stricken by Blair was invalid insofar as he was concerned and ordered a writ of mandamus issued directed to the Chairman requiring him to certify Mr. Blair's candidacy to the Secretary of State.

Before entering upon the trial the defendant (appellant) made motion to quash the rule nisi issued on the filing of the petition and demurred to the petition on sundry grounds. The motion to quash and the demurrer were overruled. The defendant reserved an exception to the order of the court overruling the motion to quash and these rulings are separately assigned as error.

The principal question here involved is whether one who offers to become a candidate for nomination in the May primary as a Democratic candidate in the November election for the office of an elector, provided for in the Twelfth Amendment to the United States Constitution, must take an oath as a condition to becoming such a candidate, as pre-

[fol. 164] scribed by the State Democratic Executive Committee, that he will aid and support the nominees of the National Convention of the Democratic Party for president and vice-president of the United States. The other features of the oath may be laid aside for present purposes.

The theory on which the petitioner claims the right to become a candidate in the primary without taking the prescribed oath is that the Twelfth Amendment, *supra*, gives electors therein provided for the right to be free to vote for a president and vice-president of the United States without compulsion on the part of any organization or authority. That said right of freedom in that respect is a constitutional right. Therefore, the State Democratic Executive Committee has no power to require them to forego that right of freedom as a condition to become a candidate in the primary held pursuant to the laws of the State of Alabama.

The State Democratic Executive Committee may prescribe the political qualifications of candidates in a Democratic primary election.—Sections 345, 347, Title 17, Code 1940; *Smith v. McQueen*, 232 Ala. 90, 166 So. 788; 18 Am. Jur. 280.

The legal status of candidates for party office or for party nomination to state office in a primary held and conducted according to law, and the cost of which is provided for out of public revenues is now well established.—*Smith v. Allwright*, 321 U. S. 64[illegible]; 18 Am. Jur. p. 273; *Bridges v. McCorvey*, 254 Ala. 67[illegible], 49 So. 2d 546.

The state laws applicable are authoritative so long as they do not infringe upon constitutional or federal enactments which have application and are consistent with the Constitution.

[fol. 165] Appellant argues that the Committee may designate its nominees or select its party officers without referring the issues to an election or a convention.—*Smith v. McQueen, supra.* And that here, the Committee could have selected its nominees for election in the November election of electors with the power conferred by the Twelfth Amendment. If so the Committee would thereby grant a privilege to its nominees, which they did not have except by author-

ity of that committee, either with or without a primary election. Such a grant having legal status with or without a primary election, cannot be conditioned upon the relinquishment by the grantee of constitutional rights. When attempted, the grant stands without the condition.—*Frost v. R. R. Com.*, 271 U. S. 583, 46 S. Ct. 605, 47 A. L. R. 457; *Terral v. Burke Contr. Co.*, 257 U. S. 529.

So that the decisive inquiry here is whether the Twelfth Amendment confers on electors freedom to exercise their judgment in respect to voting in the electoral college for a president and vice-president.

The Constitution of the United States provides:

"Article II

"* * * Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

"The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." * * *"

[fol. 166] "Article XII

"The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—The president of the senate shall, in presence of the senate and house of representatives, open all the certificates and

the votes shall then be counted;—The person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall chose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States."

[fol. 167] The members of this court expressed their views in response to an inquiry by the Governor of Alabama on April 1, 1948, in respect to a legislative enactment making certain requirements of an elector in casting his vote in the college.—250 Ala. 399, 34 So. 2d 598. The Court is now willing to adopt that opinion of the Justices as its own.

We appreciate the argument that from time immemorial, the electors selected to vote in the college have voted in accordance with the wishes of the party to which they belong. But in doing so, the effective compulsion has been

party loyalty. That theory has generally been taken for granted, so that the voting for a president and vice-president has been usually formal merely. But the Twelfth Amendment does not make it so. The nominees of the party for president and vice-president may have become disqualified, or peculiarly offensive not only to the electors but their constituents also. They should be free to vote for another, as contemplated by the Twelfth Amendment.

The question is a federal one, and there has been no authoritative pronouncement as to it. So that we are free to apply the plain logic of the situation, which is the plain meaning of the Twelfth Amendment. It would serve no useful purpose to review cases not directly in point by other state courts. Some of their implications support and some oppose our views here expressed.

We are not here concerned with questions of political expediency. As to whether or not the Twelfth Amendment to the Constitution of the United States is out-moded and should be changed is not for the courts to say. The Constitution of the United States provides its own mode of amendment. We cannot usurp that authority by judicial opinion.

We have not treated the several assignments of error [fol. 168] separately or in the order in which they are made. Some of them are based on the overruling of defendant's motion to quash and the demurrers interposed to plaintiff's petition for an alternative writ of mandamus. Others relate to the admission and rejection of evidence. Supreme Court Rule 45 provides as follows:

> "Reversals; new trial; error without injury.—Hereafter no judgment may be reversed or set aside, nor new trial granted by this court or by any other court of this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

We have carefully examined each of the assignments of error above referred to and are of the opinion that they are either without merit or do not probably injuriously affect the substantial rights of the parties.—55 C. J. S. 62, 12 C. J. 785.

It is our opinion that there is no error in the record and the judgment of the lower court is due to be and is affirmed.

Affirmed.

Foster, Lawson, Stakely and Goodwin, JJ., concur.

Brown and Simpson, JJ., dissent.

BROWN and SIMPSON, JJ. (Dissenting).

The appeal in this case is from the final judgment of the Circuit Court of Jefferson County awarding to appellee the peremptory common law writ of mandamus directed to the appellant Ben F. Ray, as Chairman of the State Democratic Executive Committee, "directing and commanding him to certify to the Secretary of State of Alabama, not less than forty days prior to May 6, 1952, the name of [fol. 169] Edmund Blair as a candidate for nomination for presidential and vice-presidential elector in the Primary Election of the Democratic Party to be held on May 6, 1952."

The judgment was entered on the 6th day of February, 1952, and the writ was promptly issued by the clerk of the court and served by the sheriff on the 7th day of February, 1952.

Before entering upon the trial, the defendant (appellant) made motion to quash the rule nisi issued on the filing of the petition and demurred to the petition on sundry grounds. The motion to quash and the demurrer were overruled. The defendant reserved an exception to the order of the court overruling the motion to quash and these rulings are separately assigned as error.

Mandamus under our system of jurisprudence is strictly "civil in its character" and must be commenced by petition showing that the defendant has in the circumstances stated in the petition authority to do the act sought to be coerced, that it is his duty to so act and that the petitioner

has a clear legal right to have said act performed at the time he filed his petition, which must show a prima facie right in petitioner and that he has no other adequate remedy.—Code of 1940, Tit. 7, § 1072; *State el rel. Pinney v. Williams*, 69 Ala. 311; *Home Guano Co. v. State*, 193 Ala. 548, 69 So. 419; *Board of Ed. of Jefferson County et al. v. State ex rel. Kuchins et al.*, 222 Ala. 70, 131 So. 239; *Williams v. Board of Dental Examiners of Ala.*, 222 Ala. 411, 133 So. 11; *Ex parte State ex rel. Hain*, 217 Ala. 702, 117 So. 418; *Minchener v. Carroll*, 135 Ala. 409, 33 So. 168; *Jones v. Jones*, 249 Ala. 374, 31 So. 2d 81; *Poyner v. Whiddon*, 234 Ala. 168, 174 So. 507; *Hodges et al. v. Board of Ed. of Geneva County et al.*, 245 Ala. 64, 16 So. 2d 97; *Ex parte Brandon*, 243 Ala. 610, 11 So. 2d 561; *Ex parte Bahakel et al.*, 246 Ala. 527, 21 So. 2d 619.

[fol. 170] The original petition avers, in short, that petitioner is a resident taxpayer and qualified voter of St. Clair County; that he was elected a Democratic Presidential Elector in 1948 on a plat form whereby he pledged not to support President Truman and he did not cast an electoral vote for President Truman in 1948; that the State Democratic Committee on January 26, 1952, adopted a resolution set out as Exhibit A to the petition; that petitioner desires to qualify as a candidate for presidential and vice-presidential elector in the 1952 Democratic Primary in Alabama. On the 29th of January, 1952, petitioner offered to qualify as such candidate with the State Chairman of the Committee of Alabama "and as the executive and administrative officer of said committee, and on said date tendered to the said chairman the sum of ten ($10.00) dollars in lawful money of the United States of American in payment of the entrance or qualifying assessment as provided for in the aforesaid resolution."

Petitioner further avers that he also presented and filed with the said Ben F. Ray as such Chairman an affidavit in words and figures as follows:

"STATE OF ALABAMA,
Jefferson County.

"I, hereby declare myself to be a candidate for the Democratic nomination in the primary elections to be held on

Tuesday, the 6th day of May, 1952, and on Tuesday, the 3rd day of June, 1952, for the office of Presidential and Vice-Presidential elector. I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for any one other than the nominees of the Democratic Party in Alabama, or any ticket other than the Democratic [fol. 171] ticket in Alabama, or openly and publicly in said general election oppose the election of the nominees of the Democratic Party in Alabama, or any of them. I further agree to abide by the result of the primary elections in which I am a candidate and I do pledge myself to aid and support all the nominees in said Primary Elections, but I will not cast an electoral vote for Harry S. Truman or for anyone who advocates the Truman-Humphrey Civil Rights Program. I further certify that I am a qualified elector of the State of Alabama and possess the qualifications fixed by law for the office for which I am a candidate, and if a candidate for the Democratic nomination for Judge of a Court of Record, I do further certify that at the time of filing this declaration of candidacy, I am not under disbarment or suspension." The declaration was signed and sworn to by appellee before a notary public on the 9th of February, 1952.

The petition further avers that said Ray as Chairman of the State Democratic Executive Committee of Alabama accepted the foregoing declaration of candidacy and the sum of ten dollars tendered by petitioner in payment of the assessment against candidates for the office for which he sought to qualify "and stated that he wanted to think it over before deciding what action he would take on said declaration of candidacy."

The petition further avers that on Wednesday the 30th of February, 1952, he caused a letter to be delivered to Ray as such Chairman, reiterating the fact of the filing of his declaration of candidacy and Ray's response thereto stated: "We construe this as an indication on your part that you will not perform your duty when the time arrives and there will not be sufficient time between your refusal and the primary to obtain relief in court if you wait until

that time. You are accordingly notified that we are pre-
[fol. 172] paring a petition for mandamus which will be filed during the day unless you advise us that you will agree to certify Mr. Blair's candidacy to the Secretary of State within the time required by law." The petition further avers that said Chairman has not agreed to certify petitioner's candidacy and that "petitioner is informed and believes, and on such information and belief, charges and states that the said Ben F. Ray as such Chairman will not certify petitioner's candidacy for such nomination" as required by Title 13, § 344, Code of 1940. The petition further avers that petitioner on the date of filing the petition on the 30th day of January, 1952, mailed qualifying papers to the Secretary of State.

By reference to Exhibit A to the petition it appears that petitioner limited his pledge of support to nominees in the primary to precinct, county, district and state officers and omitted or deleted from the pledge the following: "I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice President of the United States."

The amendment to the petition merely alleged in substance and legal effect that Chairman Ray manifested a settled purpose and determination not to certify and to delay his decision until it would be too late; that such delay was severe violation of the petitioner's rights and embarrassed petitioner by such delay and prevented him from informing his friends and supporters that he was a candidate for said office.

[fol. 173] There is an absence of allegation in the petition that the State Executive Committee exceeded the authority conferred on it by §§ 347, 348 and 350, Title 17, Code of 1940. Nor is it anywhere averred or asserted in the petition that the regulations adopted impinge any provisions of statute law, Constitution of Alabama or the Constitution of the United States, or conflicts with any Act of the Congress of the United States.

It is important to note in passing that the power and authority to prescribe the qualifications for candidates who seek to participate in the primary election of a party is vested in the executive committee, not in the chairman,

and we find nothing in the statute that authorizes, empowers or even suggests that the chairman of the committee may change, alter or ignore the prescription of the executive committee of the party.

Section 347 provides: "* * * but every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, *or to be candidates therein*, or to otherwise participate in such political parties and primaries; * * *."—(Italics supplied.)

Section 348 provides: "any person desiring to submit his name to the voters in a primary election shall, not later than March 1st, next preceding the holding of such primary election, file his declaration of candidacy *in the form prescribed by the governing body of the party with the chairman* of the county executive committee if he be a candidate for a county office, and with the chairman of the state executive committee, if he be a candidate for any office except a county office, and in like manner, and before March first, next preceding the holding of such primary election, pay an assessments that may be required to be paid by him."—(Italics supplied.)

[fol. 174] Section 350, Title 17, Code of 1940, provides *inter alia*: "At the bottom of the ballot and after the name of the last candidate shall be printed the following, viz: 'By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.' * * *."

It was conceded in argument at the bar that the members of the State Executive Committee who participated in the proceedings of the committee in adopting the resolution made Exhibit A to the petition were elected in the previous Democratic Primary of May, 1950. Certainly they are the representatives of the Democratic Party empowered by their election and provisions of the statute to declare the policies of their party formed, integrated and bound together by the principles and practices of reciprocity, common honesty and good faith for the common good of all.

The Chairman of the State Democratic Executive Committee is merely the executive head of the committee and has no authority to change, waive or ignore the resolutions of the committee, unless he is so authorized by the committee, to satisfy the individual opinion or political philosophy of a member who desires to qualify as a candidate in the primary to obtain the benefit of the party's influence and prestige in the primary. There is nothing in the circumstances alleged in the petition requiring petitioner to offer as a candidate in the Democratic Primary. His act in so offering himself as such is his voluntary act.—*Lett v. Dennis*, 221 Ala. 432, 129 So. 33; *Smith v. McQueen*, 232 Ala. 90, 166 So. 788.

[fol. 175] The statute, Code of 1940, Title 17, § 145, provides the petitioner with a plain and adequate remedy to run as a candidate for presidential elector and if elected to be free to support whomsoever he pleases. It provides:

"The probate judge of each county shall cause to be printed on the ballots to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this state, and certified in writing and filed with him not less than twenty days previous to the date of election. The certificate must contain the name of each person nominated and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election."

It is familiar law that courts will not consider and treat the constitutionality of a legislative act or a statute on the mere suggestion in the pleading at the instance of parties whose legal rights are not affected.—*Howle v. Birmingham*, 229 Ala. 666, 159 So. 206; *State ex rel. Knox v. Dillard*, 196 Ala. 539, 72 So. 56; *Smith et al. v. McQueen*, 232 Ala. 90, 166 So. 788.

The circuit court in disposing of the case seems to have taken the view that the Opinion of the Justices, no 87, is controlling in this case, especially the interpretation therein given to the 12th Amendment to the Constitution of the

United States the language of which is, "The electors shall meet in their respective states and vote by ballot for President and Vice-President * * *", which was interpreted thus:

[fol. 176] "The language of the Federal Constitution clearly shows that it was the intention of the framers of the Federal Constitution that the electors chosen for the several states would exercise their judgment and discretion in the performance of their duty in the election of the president and vice-president and in determining the individuals for whom they would cast the electoral votes of the states. History supports this interpretation without controversy. The Federalist, Vol. II, p. 35; Story on the Constitution, 5th Ed., Vol. 2, p. 318; The World Book Encyclopedia, Vol. 5, p. 2246; The Laws of the American Constitution by Burdick, Sec. 25."—Opinion of the Justices, 250 Ala. 399, 34 So. 2d 598.

At first blush it may appear that the Opinion of the Justices, *supra;* lends support to petitioner's claim. However, on more thorough examination, it is clear that said opinion is inapposite. The petitioner is not a presidential elector. He is merely asserting a right to become a candidate in the Democratic Primary and his act in filing his application of candidacy is purely of his own volition.—*Lett v. Dennis,* 221 Ala. 432, 129 So. 33; 9 R. C. L. p. 1077. He is seeking to become a candidate in a Democratic Primary without complying with the resolution duly adopted by the State Democratic Executive Committee. He is not an elector chosen by the State of Alabama and is not within the ambit of the 12th Amendment to the Constitution of the United States. Nor does he claim or assert that the right he seeks to coerce is protected by said amendment. Said advisory opinion was not dealing with a speculative right or status. It was dealing with an Act of the Legislature, presumptively valid, and constituting a rule of civil conduct enacted by the supreme power of the state —the legislature—by which all persons would be governed, if the statute stood the test of constitutionality. That opin-[fol. 177] ion is clearly not an authority applicable to the petitioner's case as presented by the pleading.

Pursuing the discussion further, that opinion, as stated,

concerned a legislative enactment designed to control the free judgment of electors to the electoral college after they had been chosen as such in the general election. Its rationale, however, is now used to prevent a political party from prescribing the qualifications for a candidate in a primary election. Conceding that the Federal Constitution does safeguard to a presidential elector the right of free and independent choice in the electoral college, we are unable to see that this principle would inhibit a political party from fixing the qualifications of a candidate desiring to run in a party primary election. It would give such a candidate no right to become an elector via any particular political party route unless he meets the qualifications prescribed by the party. Though such a candidate, after having been elected as an elector in the general election, might have the right to cast his free ballot in the electoral college, Amendment Twelve of the Constitution guarantees him no right to go to the college by any certain primary election route. So considered, the 1948 opinion would not preclude a political party, here the Democratic party, from requiring of such a candidate a pledge to support his party's nominees. Any restraint which party loyalty pledges might impose on a candidate for elector as a predicate for his running in a party primary is in no sense a restraint on his right to exercise his free ballot in the electoral college should he be elected in the general election, but is merely a restraint on his right to run in that particular party primary. Stated otherwise, the signing of the pledge prescribed in the instant case in no way interferes with the free exercise of an elector's ballot in the electoral college. This pledge is in reality a statement of present [fol. 178] intention, as distinguished from a pledge or obligation as to future acts. It creates no enforceable legal obligation on the part of the candidate to vote for a party nominee in the general election. On the contrary, it merely requires him to declare that his present intention is in accord with recognized party principles. Cf. *Swindall v. State Election Board* (Okla.), 32 P. 2d 691, 693.

Any other view, it seems, would destroy effective party government and would privilege any candidate, regardless of his political persuasion, to enter a primary election as a

candidate for elector and fix his own qualifications for such candidacy. This is contrary to the traditional American political system.—*Mairs v. Peters et al.*, (Fla.), 52 So. 2d 793, 795.

Many incongruous situations could result from the prevailing opinion. We will mention one: A voter is required by the present party rule to take the same pledge as a candidate in the ensuing primary election. A candidate for elector is relieved from taking the same pledge. If appellee should be nominated as a presidential elector in the primary election, then to carry out his pledge as a voter in that primary (to support the nominees for president and vice-president of the Democratic National Convention), he could not vote for himself as a presidential elector in the general election if Truman or his ticket were the Democratic nominees. This because as a voter, when he cast his ballot in the primary election, he pledge to support said nominees and as a candidate for elector he declined to and in effect pledged not to. Indeed, to be consistent, he could not vote for himself in the primary, since his pledge as a voter (to support the National Convention nominees) conflicts with his pledge as a candidate for elector (not to support them under circumstances). Many other incongruities could be thought of, but we forego further discussion and merely make this observation as basis for our conclusion that we should still adhere to such cases as *Lett v. Dennis*, 221 Ala. 432, 129 So. 33, and others cited *supra*.

[fol. 179] It is a universal rule applicable to court of equity as well as to court of law that, "Pleadings are statements in logical and legal form of the facts which constitute plaintiff's cause of action or defendant's ground of defense. They are the allegations of the parties of what is affirmed on the one side and denied on the other, disclosing to the court or jury, who have to try the cause, the real matter in dispute * * *. They are designed to advise the court and the adverse party of the issues and what is relied on as a cause of action or a defense, in order that the court may declare the law and that the adverse party may be prepared on the trial to meet the issues raised. * * *."—71 C. J. S. p. 17, §1; *Woodward Iron Co. v. Marbut*, 183

Ala. 310, 62 So. 804. Of course, on demurrer the pleadings are construed most strongly against the pleader.

Nor is petitioner in a position to invoke the protection of the 14th and 15th Amendments to the Federal Constitution, basic-ly designed to prohibit the states to deny to a citizen the right to vote on account of race, color or previous condition of servitude and guaranteeing the equal protection of the law. The clear purpose of the 15th Amendment was to protect the right of the slaves who were freed after the War between the States and their descendants and to deny to the states the power to deprive such persons of the right to vote on that ground. Therefore, the decisions of the Supreme Court of the United States dealing with cases of alleged fraudulent discrimination against the Negro on account of race, color or previous conditions of servitude are inapposite to the controversy presented on this record. That court has not, so far, extended any such principle to deny to a political party the right to fix the qualifications of candidates in a primary election and our view is, we should not anticipate to so extend it.

[fol. 180] So construing the averments of the petition we are of opinion that the petition fails to show that the Chairman of the State Democratic Executive Committee has the legal right and authority to accept Blair's application for qualification, which confessedly does not meet the requirements of the resolutions passed by said committee, or to certify his name to the Secretary of State. Nor is it shown by the averments of said petition that petitioner has a clear legal right to obtain such certification.

Amendment 6-A to the petition avers that Chairman Ray manifested a settled purpose and determination not to certify and to delay his decision until it would be too late and amendment 6-B avers that the delay was a severe violation of petitioner's rights and embarrassing to him. These averments are mere conclusions of the pleader.

We are of opinion, therefore, that the circuit court erred in overruling the motion of the Chairman of the Committee (appellant here), to quash the alternative writ of mandamus and in overruling the demurrer to said petition, the grounds of which are specific and challenge its sufficiency.

We are further of opinion that the judgment of the cir-

cuit court should be reversed and the demurrer sustained and the petition dismissed.—*Smith v. McQueen, supra; Lett v. Dennis, supra; Hodges et al v. Board of Education etc.*, 245 Ala. 64, 16 So. 2d 97.

[fol. 181] IN THE SUPREME COURT OF ALABAMA, 6 DIV. 395
Jefferson Circuit Court, No. 25914-X

BEN F. RAY, as Chairman of The State Democratic Executive Committee of Alabama,

v.

EDMUND BLAIR

JUDGMENT—February 29, 1952

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is therefore considered, ordered and adjudged That the judgment of the Circuit Court be in all things affirmed.

It is further considered, ordered and adjudged That the appellant, Ben F. Ray, as Chairman of The State Democratic Executive Committee of Alabama, and National Surety Corporation, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their rights of exemption under the laws of Alabama, let execution issue accordingly.

(Opinion by Livingston, C. J., Foster, Lawson, Stakely, and Goodwin, JJ., concur. Brown and Simpson, JJ., dissent.)

[fol. 182] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR STAY—Filed March 3, 1952

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

1. Comes Ben F. Ray, appellant in the above styled cause, by and through his attorneys of record, and prays that the judgment entered in this cause on February 29, 1952, be stayed pending a final determination of the cause by the Supreme Court of the United States.

2. The jurisdiction of the United States Supreme Court to review this case on petition for certiorari rests upon 28 U. S. C., § 1257(3). Jurisdiction to issue the stay requested is granted to this Court by 28 U. S. C., § 2101(f).

3. Appellant, applicant here, has been ordered by the lower court and this Court to certify appellee as a candidate for presidential elector in the Democratic Primary to be held on May 6, 1952, not later than forty days prior to said date. Unless a stay is granted, it seems unlikely that the United States Supreme Court will be able to review this case by certiorari before March 27, 1952, the date upon which appellant must comply with the order of the lower court, affirmed by this Court. Appellant does not admit that this case will become moot in any manner if this stay is not granted. To the contrary, appellant vigorously insists that this case may be reviewed by certiorari at any time up to the general elections to be held in November, 1952. But [fol. 183] appellant urges upon this Court the consideration that much confusion and uncertainty will be avoided if the judgment herein is stayed pending a review by certiorari in the United States Supreme Court.

4. Appellant further shows to this Court that forthwith he will petition the United States Supreme Court for writ of certiorari to this court to review its said judgment of February 29, 1952, in this cause.

Wherefore, appellant prays that the judgment of this Court and of the Circuit Court of Jefferson County be

stayed pending final determination of this cause by the United States Supreme Court.

/s/ Harold M. Cook, George A. LeMaistre, J. Gordon Madison, James J. Mayfield, Attorneys for Appellant.

[fol. 184] In the Supreme Court of Alabama

[Title omitted]

Order Denying Stay—March 3, 1952

It is hereby ordered that the Appellant's Application for a Stay of the Judgment of Affirmance made and entered by the Supreme Court of Alabama on Friday, February 29th, 1952, pending a review of the Judgment of the Supreme Court of Alabama by the Supreme Court of the United States, be and the same is hereby overruled and denied.

This the 3rd day of March, 1952.

/s/ J. Ed Livingston, Chief Justice of the Supreme Court of Alabama.

[fol. 185] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 186] Supreme Court of the United States, October Term, 1951.

No. 649

Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, Petitioner,

vs.

Edmund Blair

Order Allowing Certiorari—Filed March 24, 1952

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted. And it

is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The application for a stay is granted and it is ordered that the judgments and mandates of the Circuit Court and Supreme Court of Alabama be, and they are hereby, stayed pending further consideration and disposition of the case by this Court.

The case is assigned for argument on Monday, March 31st next, at the head of the call for that day. Argument is to be directed to the application for stay as well as the merits.

Mr. Justice Black took no part in the consideration or decision of these applications.

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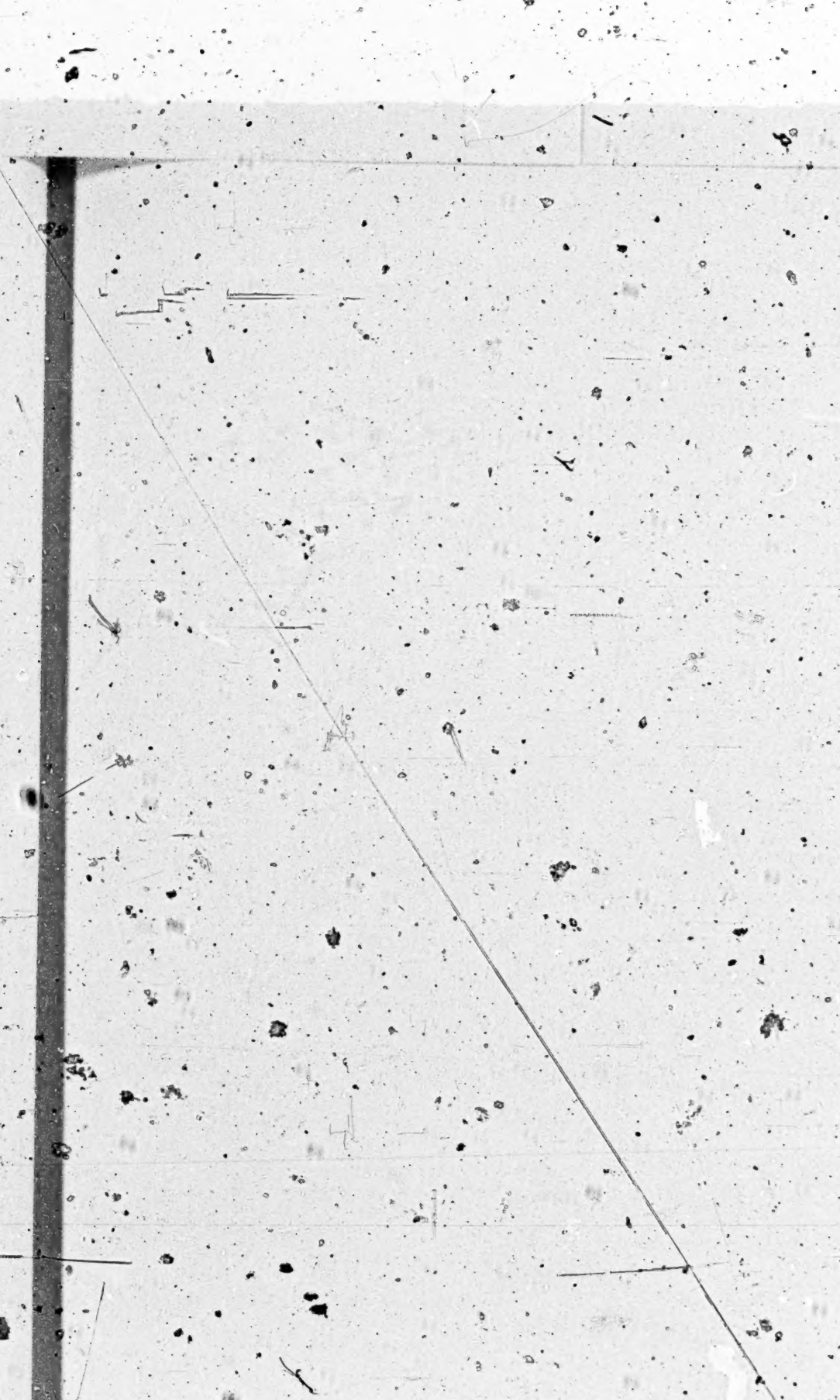

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, AS CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA, *Petitioner*,

v.

EDMUND BLAIR, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

JAMES J. MAYFIELD
HAROLD M. COOK
GEORGE A. LEMAISTRE
J. GORDON MADISON
MARX LEVA
LOUIS F. OBERDORFER
TRUMAN M. HOBBS
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	3
Statutes involved	3
Statement	4
Specification of errors to be urged	7
Reasons for granting the writ	8
Argument	14
Conclusion	31
Certificate	31
Appendix "A"	32
Appendix "B"	39

CITATIONS.

CASES:

Burroughs v. *U. S.*, 290 U. S. 534 (1934)	28
Chapman v. *King*, 154 F. 2d 460, 461 (5th Cir. 1946)	16
Columbus & Greenville Ry. v. *Miller*, 283 U. S. 96, 99-100 (1931)	30
Doremus v. *Board of Education*, 342 U. S. — (1952)	30
Fairchild v. *Hughes*, 258 U. S. 126 (1922)	30
Hodge v. *Bryan*, 149 Ky. 110, 148 S. W. 21 (1912)	21
Inland Waterways Corp. v. *Young*, 309 U. S. 517, 525 (1940)	20
In Re Green, 134 U. S. 377, 379 (1890)	9, 16, 28
Liverpool, etc, S. S. Co. v. *Comrs. of Emigration*, 113 U. S. 33, 39 (1885)	30
Massachusetts v. *Mellon*, 262 U. S. 447 (1923)	30
Missouri v. *Holland*, 252 U. S. 416, 433 (1920)	18
McCulloch v. *Maryland*, 4 Wheat. 316	26
McPherson v. *Blacker*, 146 U. S. 1 (1892)	9, 14, 16, 17, 18

no dispute that the State Democratic Executive Committee of Alabama is the governing body of the party.) The pledge, quoted in the "Statement," supra, and adopted pursuant to the statutes cited above, is a prerequisite for primary participation. But both courts below have held this pledge unconstitutional as to primary candidates for Democratic nominee for presidential elector.

It is noteworthy that Title 17, Section 350, Code, enacted in 1931, contains a similar pledge for voters in primaries. (Until the events of 1948 when Democratic electors in Alabama voted against President Truman, the phrase in Section 350 requiring voters to aid and support primary nominees was thought sufficient to guarantee support of National Convention nominees for President and Vice-President, since electors had always voted automatically for them. The 1952 resolution merely spells this out.) An Alabama statute required electors to vote for their party's nominee. Title 17, Section 226, as amended in 1945. (See Appendix A.) But the Alabama Supreme Court opined that this statute violated the Federal Constitution. *Opinion of the Justices*, 250 Ala. 399, 34 So. 2d. 598 (1948).

This Court, in *McPherson*, stated that electors are chosen "simply to register the will of the appointing power in respect of a particular candidate." (146 U. S. 1, 36.) "In relation, then, to the independence of the electors the original expectations may be said to have been frustrated," (ibid.) But only the "expectations" of some may be said to have been disappointed. For: "... the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers and not arising in their time..." (ibid.)

The fundamental fallacy in the opinion below is an assumption that there is a prohibition of some sort in the Federal Constitution prescribing any control of electoral discretion. Such a prohibition is non-existent. Article II, Section 1, provides merely that: "Each state shall appoint, in such manner as the legislature thereof may direct, a

number of electors. . . . The electors shall meet in their respective states, and vote by ballot for two persons. . . ." The Twelfth Amendment provides: "The electors shall meet in their respective states and vote by ballot for President and Vice-President. . . ."

Where is the "plain meaning" and "plain logic" upon which the Alabama Court relied, without citation of any authority whatsoever? Certainly, it cannot be seriously contended that pledged electors are unable to "meet" and "vote."

Some of the framers may have expected freely exercised discretion, but the organic document itself did not require it. And, when the Twelfth Amendment was adopted, it was quite apparent that popular choice through political parties would dictate electoral college vote. See, *Chapman* v. *King*, 154 F. 2d. 460, 461 (5th Cir. 1946).

This Court's earlier statement in *In Re Green*, 134 U. S. 377, 379 (1890) has been quoted in the preceding section of this petition. Thus, this Court has apparently approved the demise of the fiction of electoral discretion.

Justice Story wrote on the question involved:

> ". . . (N)othing is left to the electors after their choice but to register votes which are already pledged; and an exercise of an independent judgment would be treated as a political usurpation, dishonorable to the individual, and a fraud upon his constituents." (2 Story, *Constitution*, 5th Ed., p. 312.)

See also, the statement of Morison and Commager quoted in the preceding section of this petition.

The court below decided something which the framers of the Federal Constitution did not express in the document. The Constitution itself grants plenary powers to the state legislatures to appoint electors. *McPherson* v. *Blacker*, supra. But the court below refuses to allow the legislature of Alabama to exercise the power actually conferred, and rewrites the Constitution to fit its own notions of what the framers intended, without a clue of that intent

from the document. These ideas disregard the actual operations of the electoral process almost since its inception, as well as interpretive statements from this Court and other courts.

The intent of the constitutional framers varied:

> "Gerry proposed that the choice should be made by the State executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." (*McPherson* v. *Blacker*, 146 U. S. 1, 28.)

As this Court indicated in *McPherson*, the final draft of the Constitution represented a compromise of conflicting views on the method of electing a President. But, the outstanding fact emerging from any historical analysis of these sections is that the framers intended that the individual states should prescribe the method of appointing electors, and the qualifications which the electors should possess. Indeed, the constitutional silence on the matter of free electoral choice may well have been purposeful and essential since some of the leading framers strongly advocated a direct election of the President.

The lower court has bound the Federal Constitution to the unfounded fears of some people living in 1787—fears not expressed in the organic document itself. In this connection, a statement of Mr. Justice Holmes, in *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920), is pertinent:

> "... (W)hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been

> foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation."

The decision below seems to require explicit Constitutional authority for the Committee resolution. But there is no express or implied constitutional interdiction of the action. The burden is not on the proponents of the Committee action to prove its validity. The attackers must find explicit prohibitions.

California and Oregon statutes have been mentioned:

The California, Election Code, Section 10555, provides:

> "The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice-President of the United States, who are, respectively, the candidates of the political party which they represent. . . ."

The Oregon Code, Section 81-503(a) provides:

> "Said candidates (for presidential electors) shall pledge themselves, if elected, to vote for their party's nominee for President and Vice-President of the United States in the electoral college."

The legislatures of twenty-one states have refused to tolerate the fiction of electoral discretion, and have provided that the names of the electors shall not appear on the ballots at all. (See Appendix B.) The Supreme Court of Ohio in *State ex rel. Hawke* v. *Myers*, 132 O. St. 18, 4 N. E. 2d. 397 (1936), upheld the constitutionality of an Ohio act placing only presidential and vice-presidential candidates on the ballot. Similar provisions for New York voting machines were sustained in *Thomas* v. *Cohen, et al.*, 146 Misc. 835, 262 N. Y. S. 320 (1933), the court stating that mandamus would probably lie to force an elector to vote for his party's nominee for President and Vice-President. (262 N. Y. S. 326).

The court below, unless it would hold unconstitutional the procedure in twenty-one states, would have to say that the names of electors may be omitted entirely from the ballot, but that legislatures may not constitutionally require electors to adhere to a custom of over one hundred years' standing. A statement of Chief Justice Hughes is apposite:

> "General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provisions furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the states."

Smiley v. *Holm*, 285 U. S. 355, 369 (1932).

Early Supreme Court cases attest to the efficacy of custom and usage as a guide to constitutional meaning. E.g., *Stuart* v. *Laird*, 1 Cranch 299, 309 (1803). And Mr. Justice Frankfurter has stated: "Even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 525 (1940).

The court below may not rely on the text of the Constitution. No prohibition against pledged electoral votes is there; no provision for free electoral college discretion appears. Thus, custom has not changed *the text*. At most, only the "expectations" of some of the framers, unarticulated in the organic document, have been altered.

Even in the absence of statutory mandate, courts of various states have required, in effect, that electors vote for their party's nominee.

State ex rel. Nebraska Republican Committee v. *Wait*, 92 Neb. 313, 138 N. W. 159, 43 L. R. A. (N. S.) 292 (1912), mentioned above, is precisely in point. In 1912, at an April

Republican primary, electors were nominated and voters expressed a choice of Roosevelt for President. However, the National Republican Convention, meeting in June, chose Taft as its presidential nominee. At a July Republican State Convention the majority of the delegates voted to abandon Taft and support Roosevelt, the Progressive Party nominee. Thereupon, the Progressive Party in Nebraska nominated electors, six of whom had been nominated Republican electors. The minority group in the Republican party in Nebraska then established its own slate of electors for Taft and petitioned for mandamus to compel the Secretary of State of Nebraska to print the names of the Taft men under the Republican column on the ballot. The Supreme Court of Nebraska affirmed the granting of the writ of mandamus, holding that the lower court had properly ordered the Secretary of State to remove the Roosevelt electors from the Republican column and to replace them with Taft electors. The Court's rationale has been discussed previously.

It is little short of fraudulent for electors to run under the Democratic column, and then be able to vote in the electoral college for nominees for other parties. Since the Alabama Democratic electors voted for Thurmond in 1948, Alabama voters were totally unable to vote for President Truman, if they so desired. The lower court has implemented a potentially similar situation in 1952.

There are other practical reasons why electors should be required to vote for the national party nominee. Because of years of custom, the people have considered the merits of only the candidates for President and Vice-President. Usually, most of the voters know nothing of the persons who are candidates for electors. And they have ignored the electoral candidates for a good reason.

> "They (the electors) have no duties to perform which involve the exercise of judgment in the slightest degree. . . . Their sole function is to perform a service which has come to be nothing more than clerical —to cast, certify, and transmit a vote already pre-

> determined. . . . They are in effect no more than messengers whose sole duty is to certify and transmit the election returns."
>
> *Spreckles* v. *Graham*, 194 Cal. 516, 531, 228 P. 1040, 1045 (1924).

See also: *Hodge* v. *Bryan*, 149 Ky. 110, 148 S. W. 21 (1912). The reasoning of those two cases is designed to show that electoral duties are so perfunctory that the electors should be nominated by convention even though nominations for state and public offices generally are made by primary election.

The court below has made a travesty of the electoral system as it now exists by saying that national elections do not involve merely a choice among presidential and vice-presidential nominees.

Democratic electors, by statements that they will not vote for the National Party nominee, will be acting in a manner totally inconsistent with their nomination. It is a contradiction resulting in a nullity to allow electors to represent the Democratic Party and to allow them simultaneously to vote against the Democratic nominee.

The following annotation at 43 L. R. A. (N. S.) 284, is pertinent:

> "Irrespective of whether any power can legally compel the elector to vote the will of either his national party or of his state party, it is obvious that a state may enact such election laws as will practically prevent the election of any man not morally bound to vote for the nominees of his party's national convention, or in the same way it might secure the election of men who are obliged to vote the will of the state party."

And further (p. 287):

> "The purpose of such legislation is briefly stated in 26 Harvard Law Review, p. 353: 'But the whole purpose of conferring the right to use the party name on the ballot is to enable voters, without personal knowledge of the individual nominee, to vote for men supporting

the party principles. If the representation on the ballot is deceptive, the law is more than nullified. There is certainly no injustice to the nominee in depriving him of his right when he is making an unconscionable use of it to defraud the voters.'"

Petitioner urges this court to grant certiorari and to reverse the court below. That decision stands alone. And this Court has spoken in the *McPherson* and *Green* cases.

An observation of Thayer in his *Legal Essays* is most penetrating:

> "And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution—of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union from territory not belonging originally to it; that it was unconsitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it legal tender, to enact a protective tariff, that these and a hundred other things were a violation of the Constitution has been solemnly and passionately asserted by statesmen and lawyers. Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its spirit and sought thus, when the question was one of mere power, to restrict its great liberty." (Thayer, *Legal Essays*, p. 158 (1908).)

Nothing is more vital to representative democracy than a well informed electorate. An imperative corollary is that voters know those persons for whom they vote, know the principles for which those persons stand, and that they not leave the ultimate decision involving selection of candidates

for high office to a handful of electors who may arbitrarily flout the will of the majority as expressed by their votes. This latter course is precisely the path laid out by the Alabama Court. It forces the voters of Alabama to abdicate their right and privilege to select the President of the United States, and to leave this vital matter to a few electors.

Another significant concept of American democracy, as it has developed through one hundred and sixty years of successful operation, is responsible party government. In modern history the United States and England are the best examples of successful representative democracies. Students of the two governments generally concede that their strength is in their ability to resolve all political shades of opinion into two powerful responsible parties. We have witnessed the spectacle of splinter parties in other countries of the world. France is an outstanding example of the deleterious effect of splinter parties. The Weimar Republic in Germany preceded the rise of Hitler. Weak and divided rule in Russia contributed to the ascension of Lenin and Stalin.

The Alabama Supreme Court has undermined effective party organization in Alabama. It is immaterial, that court holds, whether respondent and his group are in the majority or minority. If they are in the minority, that court has enabled them to impose their will on the majority. And the vastness of respondent's success is incredible. For respondent would have to admit that he and his group cannot command a majority at either the Democratic National Convention or in the State Department Executive Committee. Yet he persuaded the Alabama Court to tell the voters and people of Alabama that the Federal Constitution enables him and his group to pose as Democrats and at the same time oppose all known regularly constituted Democratic organizations.

A free electorate is highly desirable. And a free electorate is impossible where through subterfuge the people do not know those persons for or against whom they vote.

They vote for these persons, in large part, because of the party under whose banner they stand. But the Alabama Court tells us that respondent and his group must, by Constitutional command, decide for several million people in Alabama who should be President of the United States. If respondent and his group select Mr. X, whom no one in Alabama has ever heard of, this result, the Alabama Court holds, is dictated by the Federal Constitution. This is so, under the theory below, because an elector must exercise freely his judgment in the selection of the nation's President. This interpretation places the United States Constitution at odds with all concepts of the proper operation of a representative democracy. Democracy thrives on secret ballots, but not on secret elections. Respondent defines democracy in terms of his unfettered freedom to act as capriciously as he deems the situation requires. And he would sacrifice the principle of party government which has made this nation great for a purported constitutional right to act as arbitrarily as he pleases. The Alabama Supreme Court has apparently adopted his views.

The Democratic Committee, by adopting a party loyalty pledge, has not dictated respondent's electoral vote. The Committee action means simply that if respondent is not a Democrat and cannot resolve his differences with a majority of both national and state Democrats, he must seek political affiliation elsewhere. Respondent may run as a Republican or as a member of any other political party. We submit he may not successfully claim a constitutional privilege to run as a Democrat and vote as a Republican.

Respondent has made clear his intention to announce well in advance to the voters that he will under no circumstances vote for certain Democrats should they become the Democratic nominee for President. If respondent has a constitutional right to run as a Democratic elector and vote as he pleases when he announces his intention in advance, others have that same constitutional right when they are secret or deceitful about their real intent and mask from the voters until after election day their real purposes and

allegiances. It is impossible for the court below to read into the Federal Constitution any limitation on the alleged principle on which its decision rests that such principle applies only where the electors have advised the voters in advance of their intent to bolt the party. If a political party has no positive duty to assure the voters that electors who run under the party standard will vote for the party nominees, we submit that at least our Constitution does not require that the party do nothing to prevent such deceit of the voters.

If voters are not entitled as a matter of right to assurance when they vote for a candidate for elector in the Democratic primary election, that such candidate will vote for the Democratic nominee for President, surely there is no constitutional prohibition against the voters having this assurance.

B.

The Committee action under attack in this case is a pledge to aid and support the nominees of the Democratic National Convention, required as a condition for participation as a candidate for Democratic Primary nomination in Alabama. Elector-candidates are included.

It is submitted that even full and untrammeled electoral choice does not mean free electoral college vote plus the right to be a Democrat or a Republican regardless of the political qualifications fixed by those parties. Certainly, even under the Alabama Court's interpretation of the Federal Constitutional provisions applicable to presidential elections, Alabama's electors have no constitutional right to go to the electoral college via the Democratic primary.

The Democratic party can prevent their running as Democrats if they are unwilling to pledge support to the Democratic nominees. If they want free choice, then they must run as independents or under the auspices of some party requiring no loyalty pledge. Furthermore, the decision to run as a Democratic candidate for elector constitutes in itself a free exercise of electoral discretion.

It is no answer to reply that if an elector is to be successful in his quest for general election in Alabama he must run as a Democrat since he would lose as a Republican or Independent. A grave constitutional issue is involved in this case. It is a serious thing to strike down the action of the State Democratic Committee, based on an Alabama statute, as violative of the Federal Constitution. Such an answer ignores Chief Justice Marshall's injunction that "it is a Constitution we are expounding." *McCulloch* v. *Maryland*, 4 Wheat. 316. The Federal Constitution may not be tailored to afford political protection for non-Democrats by allowing them to run as Democrats. Nor may that Constitution be given one interpretation in Alabama and another in New York because of existent political peculiarities.

The court below rejected a hypothetical analogy demonstrating the propriety of a loyalty pledge for electors who desire to become candidates in the Alabama Democratic primary. If the Committee had appointed eleven electoral candidates to run in the November election, Title 17, Section 336, Code, gives the Committee such power, and if the Committee had selected its candidates for elector according to the sole criterion of whether or not these candidates would pledge support to the presidential and vice-presidential nominees of the Democratic National Convention, we submit that such action would not violate Article II, Section 1 or the Twelfth Amendment.

The legality of this hypothetical Committee action was sustained in *Seay* v. *Latham*, 143 Tex. 1, 182 S. W. 2d 251 (1944). The facts are almost precisely similar to those assumed in the above example. The May Texas Democratic Convention selected 23 electors who were absolved from obligation to support the nominees of the Democratic National Convention. Their names were certified to the Secretary of State. The National Convention nominated Roosevelt and Truman. Fifteen of the May nominees announced that they would not vote for Roosevelt and Truman in the electoral college. Whereupon the State party

held a September convention, withdrew the nomination of the "May fifteen" and nominated fifteen substitutes, who would support the nominees of the National Convention. Mandamus issued to the Secretary of State to compel him to replace the previously certified "May nominees" with the "September nominees."

The Texas court stated the matter was clearly one "within the inherent power of the Party." (182 S. W. 2d 253.) Further: "The power to determine the policies of the Party, including the power to determine who shall represent it in the selection of the President and Vice-President of the United States, when not otherwise provided by statute or by rule of the association, resides in the State Convention of the Party." (182 S. W. 2d 253.) And again: "A presidential elector is selected by the Party as its nominee primarily to effectuate its policies and register its will in respect to a particular candidate. *McPherson* v. *Blacker*, 146 U. S. 1, 146 S. Ct. 3, 36 L. Ed. 869."

We submit that *Seay* v. *Latham*, supra, is correct, and that *a fortiori*, the Committee may exact a similar pledge as a condition for becoming a candidate for nomination by primary election.

The decision below stated that *Smith* v. *Allwright*, 321 U. S. 649 (1944) has created a "legal status" in primary elections. The precise meaning of this phrase is cloudy. Perhaps it means that because the lower court has decided that Article II, Section 1 and the Twelfth Amendment command free electoral discretion, political parties may not exact advance pledges such as the one at bar even as a condition for primary participation on the authority of *Smith* v. *Allwright*, supra.

The complete answer is that *Smith* v. *Allwright* holds that a Negro may not be barred from voter participation in a party primary election solely because of his color. Such action is state action violative of the Fourteenth and Fifteenth Amendments. The exercise of voter franchise is insulated against such invidious discrimination, and since

the general right to vote is involved, such insulation extends to all stages of the election process.

However, a presidential elector is assured no general right of franchise under any interpretation of the Federal Constitution. His constitutional role is impersonal in the sense that it is merely part of the constitutional machinery for electing a President and Vice-President. If the framers had been creating constitutionally protected personal rights in electors, it would seem that they would have spelled out the safeguard. Certainly other constitutional sections insuring personal rights contain specific protective language.

Electors are state officers when elected. *In Re Green*, 134 U. S. 377; *Burroughs v. U. S.*, 290 U. S. 534 (1934). However, the due process clause does not preserve a right to state political office either as a property right or as a matter of liberty. *Snowden* v. *Hughes*, 321 U. S. 1, 7 (1944). There is no allegation or proof of invidious discrimination, thus no equal protection considerations are present. Nor may respondent invoke the privileges and immunities clause. *Snowden v. Hughes*, supra, p. 7.

If electors have no constitutional right to run in primaries, the Committee action at bar is not prohibited by *Smith* v. *Allwright*, 321 U. S. 649, under any interpretation of Article II, Section 1 and the Twelfth Amendment.

Even if the court below were correct in its notion that these constitutional sections command free electoral choice, only on some theory that the sections proscribe even a voluntary restraint would *Smith* v. *Allwright* be at all apposite. And such a theory exceeds the bounds of reason.

This goes to the root of the matter. Since electors have no constitutionally protected personal right to run in a primary (see above); since the constitution does not make choice to run in a given primary a coerced and, therefore, invalid one, merely because the candidate foresees success only with that party's endorsement; since the Twelfth Amendment and Article II, Section 1 create no personal rights in electors, but merely establish a scheme for choos-

ing a President, then the court below must say that even a voluntary pledge in advance of electoral vote violates these sections in order to invoke *Smith* v. *Allwright* to invalidate the Committee action at bar. Certainly, the court below did not intend to go this far.

C.

The discussion in the previous sections of the "Argument" demonstrates that respondent has shown no violation of a constitutional right accruing to him; and that the court below erroneously found any constitutional command that respondent should be allowed to run as a Democratic primary candidate without having to comply with the requisite loyalty pledge. Neither respondent nor the court below has discovered how respondent has been injured in his constitutional rights. This is so no matter what view one takes of the meaning of Article II, Section 1 and the Twelfth Amendment.

It is submitted that constitutional questions are not properly decided *in vacuo*. A basic tenet of constitutional law was enunciated by this Court in *Liverpool, etc. S. S. Co.* v. *Comrs. of Emigration*, 113 U. S. 33, 39 (1885):

> "It (the Supreme Court) has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the *legal rights* of litigants in actual controversies." (Emphasis supplied.)

Absent a personal or property right one has no standing to attack the validity of a statute. *Columbus and Greenville Ry.* v. *Miller*, 283 U. S. 96, 99-100 (1931):

> "The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

Furthermore, one must show that he has been injured by the operation of the statute he is attacking. *Tyler* v. *The Judges*, 179 U. S. 405 (1900).

These well-settled concepts have been reiterated many times in decisions of this Court. See, e. g.: *Fairchild* v. *Hughes*, 258 U. S. 126 (1922); *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923); *Doremus* v. *Board of Education*, 342 U. S. —— (1952).

We submit, of course, that all these cases apply to attacks on the validity of the primary regulations of political parties. Therefore, the court below erroneously decided to adjudicate the constitutional issues in this case.

CONCLUSION.

For the foregoing reasons, and for the reasons stated in petitioner's application for stay which was filed on March 10, 1952, petitioner's application for stay should be granted, a writ of certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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Certificate.

I hereby certify that I have mailed, properly stamped and addressed, a copy of the foregoing petition for writ of certiorari to Horace C. Wilkinson, Esq., opposing counsel of Birmingham, Alabama, on this the day of March, 1952.

.....

Of Counsel.

APPENDIX "A."

RELEVANT ALABAMA ELECTION STATUTES APPEARING IN ALABAMA CODE, 1940, TITLE 17:

Sec. 75. Presidential electors and congressmen; when elected.—Electors for president and vice-president of the United States shall be elected on the first Tuesday after the first Monday in November, 1940, and every fourth year thereafter; a member of congress from each congressional district shall be elected on the first Tuesday after the first Monday in November, 1940, and every second year thereafter.

Sec. 222. Presidential electors and representatives in congress to be elected.—On the day prescribed by this Code there are to be elected, by general ticket, a number of electors for president and vice-president of the United States equal to the number of senators and representatives in congress to which this state is entitled at the time of such election; and there shall be elected one representative in congress for each congressional district.

Act. No. 386, General Acts of Alabama 1945, p. 605:

Sec. 1. Section 226 of Title 17 of the 1940 Code of Alabama is hereby amended to read as follows: "Section 226: The electors of president and vice-president are to assemble at the office of the Secretary of State, at the seat of government, at twelve o'clock noon on the second Tuesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president, and those of them present at that hour must at once proceed by ballot and plurality of votes to supply the places of those who fail to attend on that day and hour, and shall cast their ballots for the nominee of the national convention of the party by which they were elected."

Act No. 557, General Acts of Alabama 1951, p. 973:

Sec. 1. That Section 226 of Title 17 of the Code of Alabama of 1940 be, and the same hereby is, further amended to read as follows:

"Section 226: Electoral meeting and supply of vacancies, —The electors of president and vice-president are to assemble at the office of the secretary of state, at the seat of government at twelve o'clock noon on the second Tuesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president; and those of them present at that hour must at once proceed by ballot and plurality of votes to supply the places of those who fail to attend on that day and hour."

Sec. 336. Election by party as to whether it will come within primary law.—A primary election, within the meaning of this chapter, is an election held by the qualified voters, who are members of any political party, for the purpose of nominating a candidate or candidates for public or party office. Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law. All political parties are presumed to have accepted and come under the provisions of the primary election law, but any political party may signify its election not to accept and come under the primary election law by filing with the secretary of state, at least sixty days before the date herein fixed for the holding of any general primary election, a statement of the action of its state executive committee, certified by its chairman and secretary, which statement shall contain a copy of the resolution or motion adopted declining to accept and come under the primary election law. If a political party declines to accept and come under the primary election law it shall not change its action and accept and come under the primary election law until after the next general election held thereafter. The state executive committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this chapter unless the method of their election is otherwise directed by the state executive committee of the party holding the election.

Sec. 341. Committees.—There may be provided a committee of each party for the state and each political subdivision of the state, including counties and municipalities, said committees to be selected in such manner as may be

provided for by the governing authority of each party, but if there shall not be elected or chosen any committee for any county or municipality, then all the powers which could be exercised by any such committee shall be vested in the state executive committee, under such rules and regulations as the governing authority of the party may designate; provided, however, that should no committee be elected or chosen from any municipality in the state, then the executive committee of the county in which said municipality is located shall exercise the powers and perform the duties of the executive committee of such municipality. The state executive committee may provide for the selection of any such committee.

Sec. 344. Certification of names of candidates by chairman.—The chairman of the state executive committee of each party entering a primary election shall, not less than forty days prior to the date of holding the election, certify to the secretary of state the names of all candidates for nomination to federal, state, circuit, and district offices, the state senate and house of representatives, and all other candidates, except candidates for county offices. The chairman of the county executive committee of each party entering the primary election shall, not less than forty days prior to the date of holding the election, certify to the probate judge the names of all candidates for nomination to county offices. The secretary of state shall, not less than thirty days prior to the date of holding the primary election, certify to the probate judge of every county in which the election is to be held the names of the candidates for nomination to federal, state, circuit, and district offices, the state senate and house of representatives, and all other candidates, except candidates for county offices. The probate judge of each county shall have the ballots prepared for the primary election. If a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, his name shall not be printed on the ballots to be used in the primary election, and he shall be the nominee of the party with which he has qualified for the office. The probate judge shall have the ballots so printed that the names of the opposing candidates for any office to be voted for by the voters of more than one county shall, as far as practicable, alternate in

position upon the ballot so that the name of each candidate shall occupy, with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of ballots. When printed, the ballots shall be distributed impartially and without discrimination by the probate judge. (as amended)

Sec. 345. Candidate must be legally qualified to hold office.—The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party.

Sec. 347. Who may vote in primary.—All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary ballot of that political party, and no other; but every state executive committee of a pary shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entitled to become candidates therein; provided, that nothing herein contained shall be so construed as to prohibit any state executive committee of a party from fixing assessments or such other qualifications, as it may deem necessary, for persons desiring to become candidates for nomination to offices at a primary election, but such assessments shall not exceed two per cent of one year's emolument from all sources, of the office sought, and for an unremunerative or party county office it shall not exceed five dollars, or twenty-five dollars for an unremunerative or party office to be filled by the vote of a subdivision greater than one county, or one

hundred dollars for an unremunerative or party office filled by the vote of the whole state.

Sec. 348. Filing declaration of candidacy.—Any person desiring to submit his name to the voters in a primary election shall, not later than March first, next preceding the holding of such primary election, file his declaration of candidacy in the form prescribed by the governing body of the party with the chairman of the county executive committee if he be a candidate for a county office, and with the chairman of the state executive committee, if he be a candidate for any office except a county office, and in like manner, and not later than March first, next preceding the holding of such primary election, pay any assessments that may be required to be paid by him. (as amended)

Sec. 350. Official ballots and election stationery.—Separate official ballots and other election stationery and supplies for each political party shall be printed and furnished for use at each election district or precinct, and shall be of a different color for each of the political parties participating in such primary election. All ballots for the same political party shall be alike, except as herein otherwise provided, printed in plain type, and upon paper so thick that the printing cannot be distinguished from the back. Across the top of the ballot shall be printed the words, "Official Primary Election Ballot." Beneath this heading shall be printed the year in which said election is held and the words "Democratic Party" or "Republican Party" or other proper party designation. Each group of candidates to be voted on shall be preceded by the designation of the office for which the candidates seek nomination, and in the proper place shall be printed the words, "Vote for one", or "Vote for two", (or more) according to the number to be elected to such office at the ensuing election. At the bottom of the ballot and after the name of the last candidate shall be printed the following, viz.: "By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election." Should any voter scratch out, deface or in any way mutilate or change the pledge printed on the ballot, he shall not be considered or held to have repudiated or to have refused to take the pledge, but shall, conclusively, be presumed and held to

have scratched out, defaced, or mutilated or changed same for the sole purpose of identifying his ballot; and accordingly such ballot shall be marked "Spoiled Ballot" and shall not be counted.

Sec. 389. Power of state committee to provide rules of party procedure.—The state executive committee may prescribe such other additional rules governing contests and other matters of party procedure as it may deem necessary, not in conflict with the provisions of this chapter.

Sec. 145. Names of candidates placed on ballots; certificate of nomination.—The probate judge of each county shall cause to be printed on the ballots to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this State, and certified in writing and filed with him not less than sixty days previous to the day of election. The certificate must contain the name of each person nominated and the office for which he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election.

In case of a person to be voted for by the electors of the whole state or of an entire congressional district, judicial circuit, or senatorial district for any state or federal office, the certificate of nomination must be filed in the office of the secretary of state not less than sixty days before the day of election; and the secretary of state must thereupon immediately certify to the judge of probate of each county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated.

The judge of probate shall also cause to be printed upon the ballots, the name of any qualified elector who has been requested to be a candidate for any county or municipal office by written petition signed by at least twenty-five

electors qualified to vote in the election to fill said office, when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide primary election is held.

The secretary of state shall also certify to the judge of probate of the several counties, as the case may be, the name of any qualified elector who has been requested to be a candidate for any state or federal office by written petition signed by at least three hundred electors qualified to vote in the election to fill said office provided such petition is filed with the secretary of state before the first Tuesday in May in the year in which a state-wide primary election is held. The judge of probate shall cause to be printed upon the ballots, the name, or names, of such qualified elector or electors, as the case may be.

Provided, however, that the judge of probate of the several counties in this state are hereby prohibited from causing to be printed on the ballot to be used in their respective counties, the name of any independent candidate for any state, county, or federal office who has not filed his declaration to become such a candidate before the first Tuesday in May in the year in which a state-wide primary election is held. (As amended)

Sec. 138. Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in Section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem.

Sec. 155. Ballots for independent candidates.—The elector may write in the column under the title of the office the name of any person whose name is not printed upon the ballot for whom he may desire to vote. In case of nomination by independent bodies, the ballot shall be so arranged that at

the right of the last column for party nomination the several tickets of the names of the independent candidates shall be printed in one or more columns according to the space required, having above each of the tickets the political or other names selected to designate such independent nominations. The ballot herein provided shall be substantially in the following form, viz: . . .

Sec. 388. New primary in case contest cannot be decided.—If, upon the hearing of any contest for any office, as provided for in this chapter, the committee, after an investigation and hearing of the contest, shall determine that it is impossible from the evidence before it to decide who is the legally nominated candidate for the office contested, it shall have the right and authority to direct a new primary election for the nomination to any such office, but where any action is taken by any county executive committee, either person to the contest, in the same manner as herein provided for in the case of appeals from the action of any county committee, may take an appeal to the state executive committee, which shall be the court of final appeal in all party contests of nominations; provided, that upon hearing of any contest or appeal, as provided for in this chapter, which is not referred to and decided by a sub-committee, fifteen members of any such state executive committee shall constitute a quorum for the hearing and determining of such contest, or appeal, provided further, that the entire committee be notified of the meeting in the usual way.

APPENDIX "B"

RELEVANT STATUTES IN THOSE STATES WHICH PROVIDE THAT THE NAMES OF CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES SHALL APPEAR ON GENERAL ELECTION BALLOTS IN LIEU OF THE NAMES OF CANDIDATES FOR PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTORS.

California

Deering's California Code, Elections:

§ 3003. Presidential Candidates and Electors. Whenever a group of candidates for presidential electors equal in number to the number of presidential electors to which

this State is entitled filed a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

§ 10555. Convening and Voting for President and Vice-President: Party Vote. The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this State.

COLORADO

1935 Colorado Statutes Annotated, Chapter 59:

§ 197. (As amended) Form of ballot.—Every ballot, intended for the use of voters, shall contain the names of all candidates for offices to be balloted for at that election, whose nominations have been duly made and accepted as herein provided, and who have not died or withdrawn, and shall contain no other names of persons except that when presidential electors are to be elected, their names shall not be printed upon the ballot, but in lieu thereof, the names of the candidates of their respective parties or political groups for president and vice-president of the United States shall be printed together in pairs under the title "presidential electors." Such pairs shall be arranged in alphabetical order of the names of the candidates for president in the manner provided for in section 198 of this chapter. A vote for any such pair of candidates shall be a vote for the electors of the party or political group by which such candidates were named and whose names have been filed with the secretary of state. . . .

CONNECTICUT

Connecticut General Statutes (1949 Revision):

§ 1043. Vote for presidential electors. When an election is to be held for the choice of electors of president and vice-president of the United States, if any political party shall have nominated candidates for president and vice-

president of the United States, and electors to vote for such presidential and vice-presidential candidates shall have been nominated by a political convention of such party in this state, or in such other manner as shall entitle the names of such electors to be placed upon the ballots or voting machines to be used in such election, it shall be lawful for the secretary and for every other official charged with the preparation of ballots or voting machines to be used in such election, in lieu of placing the names of such electors of president or vice-president on such ballot or voting machine, to place on such ballots or voting machines a space with the words "Presidential electors for (here insert the last name of the candidate for president, the word 'and' and the last name of the candidate for vice-president)"; and a vote cast by making a crossmark to the left of such space, or by registering a vote in such space in the manner required by the voting machine, shall be counted, and shall be in all respects effective, as a vote for each of the presidential electors representing such candidates for president and vice-president.

DELAWARE

Laws of Delaware 1943, Chapter 119, page 403:

Section 1. . . . There shall be two separate ballots, to-wit: a Presidential and Vice-Presidential Ballot and a State, County and District Ballot. The Clerks of the Peace for the several Counties shall cause to be printed on the Presidential and Vice-Presidential Ballot, herein provided for, the names of the candidates nominated for President and Vice-President by the parties recognized by them as political parties within the meaning of this Chapter, as shall be certified to them by the Secretary of State; . . .

On the sample ballot set out in Section 3 of the above Act appears the following statement:

"A vote for the candidates for President and Vice-President shall be a vote for the electors of such party, the names of whom are on file with the Secretary of State."

ILLINOIS

Illinois Revised Statutes 1951, Chapter 46:

§ 21-1. . . . (b) The names of the candidates of the several political parties or groups for electors of President

and Vice-President shall not be printed on the official ballot to be voted in the election to be held on the day in this Act above named. In lieu of the names of the candidates for such electors of President and Vice-President, immediately under the appellation of party name of a party or group in the column of its candidates on the official ballot, to be voted at said election first above named in section 2-1, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice-President of such party or group with a square to the left of such bracket. Each voter in this State from the several lists or sets of electors so chosen and selected by the said respective political parties or groups, may choose and elect one of such lists or sets of electors by placing a cross in the square to the left of the bracket aforesaid of one of such parties or groups. Placing a cross within the square before the bracket enclosing the names of President and Vice-President shall not be deemed and taken as a direct vote for such candidates for President and Vice-President, or either of them, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided. Voting by means of placing a cross in the appropriate place preceding the appellation or title of the particular political party or group, shall not be deemed or taken as a direct vote for the candidates for President and Vice-President, or either of them, but instead to the Presidential vote, as a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided. . . .

INDIANA

Burns Indiana Statutes Annotated:

§ 29-3902. Names on ballots—Form.—The names of the candidates for electors of president and vice-president of the United States, of any political party or group of petitioners, shall not be placed on the ballot, but, in arranging and preparing the ballots for the election at which presidential electors are to be elected, the names of the candidates for president and vice-president of the United States, respectively, of such political parties or groups of petitioners, shall be placed in one (1) column on the ballot,

where ballots are used, and on one (1) ballot label, in one (1) column or row, where voting machines are used in the same form and manner as the names are set out in section 120 (§ 29-3903), under the title and device of such political party or group of petitioners, nominating a group of candidates for presidential electors. Wherever the names of the candidates for president and vice-president of the United States, respectively, are so printed, there shall be printed above their respective names the words: "For presidential electors for."

§ 29-3904. Votes cast for president and vice-president construed as votes for electors—Counting, canvassing and certifying of votes.—Every vote cast or registered for the candidates for president and vice-president of any one political party or group of petitioners shall be conclusively deemed to be a vote cast or registered for all of the candidates of such political party or group of petitioners for the presidential electors of such party or group of petitioners, and shall be counted as such. The votes cast or registered for the candidates for president and vice-president of any political party or group of petitioners shall be counted, canvassed and certified in the same manner, and subject to the same penalties and liabilities, as the votes for other candidates.

IOWA

Code of Iowa 1950:

Ch 49, § 49.32 Candidates for president in place of electors. The candidates for electors of president and vice-president of any political party or group of petitioners shall not be placed on the ballot, but in the years in which they are to be elected the names of candidates for president and vice-president, respectively, of such parties or group of petitioners shall be placed on the ballots, as the names of candidates for United States senators are placed thereon, under their respective party, petition, or adopted titles for each political party, or group of petitioners, nominating a set of candidates for electors.

Ch 54, § 54.2 How elected. A vote for the candidates of any political party, or group of petitioners, for president and vice-president of the United States, shall be conclu-

sively deemed to be a vote for each candidate nominated in each district and in the state at large by said party, or group of petitioners, for presidential electors and shall be so counted and recorded for such electors.

KENTUCKY

Kentucky Revised Statutes 1948:

§ 118.070 Persons entitled to have name placed on ballot for regular election. (1) . . . the county clerk of each county shall cause to be printed on the ballots for the regular election the names of the following persons: . . .

(f) Candidates for President and Vice President of the United States, of those political parties and organizations who have nominated presidential electors, as provided in KRS 118.090, where the certificate of nomination of such electors has been filed with the Secretary of State within the time prescribed in KRS 118.130.

§ 118.170 Form of ballot; party emblems; method of indicating public questions. . . .

(6) The names of candidates of the several political parties and organizations for electors of President and Vice President of the United States shall not be printed on the ballot, but in lieu thereof, immediately under the party name or device of each party in the column of its candidates on the official ballot, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice President of such party, with a square to the right of the bracket. The placing of a cross within the square to the right of the bracket enclosing the names of candidates for President and Vice President, or in the circle at the head of the column of such party, shall not be deemed and taken as a direct vote for such candidates for President and Vice President, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party as provided in KRS 118.090.

MARYLAND

Annotated Code of Maryland, Article 33:

§ 99. The form and arrangement of the ballots shall be as follows: All ballots shall contain the name of every

candidate whose nomination for any office specified in the ballot has been certified to and filed according to the provisions of this Article, and not withdrawn in accordance therewith, except that the names of the candidates for the office of Electors of President and Vice-President of the United States shall not be printed on the ballot but in lieu thereof the names of the candidates of each political party for the office of President and Vice-President shall be printed thereon. . . . There shall be left at the right of the surnames of the candidates for President and Vice-President, so formed as to include both names, a sufficient clear square in which each voter may designate by a cross (X) his choice for electors, and a cross (X) placed by the voter in the square opposite the names of the candidates of a party for President and Vice-President shall be deemed and counted as a vote for each of the Presidential Electors of said party named in the certificate of nomination filed according to the provisions of this Article. . . .

§ 197. On the day fixed by law of the United States for choice of President and Vice-President of the United States there shall be elected by general tickets as many electors of President and Vice-President as this State shall be entitled to appoint; provided that the names of the candidates for the office of electors of President and Vice-President of the United States shall not be printed on the ballot but in lieu thereof the names of the candidates of each political party for the office of President and Vice-President shall be printed thereon; and a vote for said candidates for President and Vice-President shall be deemed and counted as a vote for each of the Presidential electors of said party named in the certificate of nomination of such Presidential candidates filed according to the provisions of this Article.

MASSACHUSETTS

Annotated Laws of Massachusetts, Chapter 54:

§ 43. Presidential Electors, Arrangement of Names of Candidates, etc.—The names of the candidates for presidential electors shall not be printed on the ballot, but in lieu thereof the surnames of the candidates of each party for president and vice president shall be printed thereon in the line under the designation "Electors of president and vice president" and arranged in the alphabetical order of the

surnames of the candidates for president, with the political designation of the party placed at the right of and in the same line with the surnames. A sufficient square in which each voter may designate by a cross (X) his choice for electors shall be left at the right of each political designation.

MICHIGAN

Compiled Laws of Michigan 1948:

§ 177.16. . . . At the general November election in the year in which electors of president and vice-president of the United States are elected, a separate ballot shall be printed, upon which shall be printed the names of the candidates for president and vice-president of the United States in the manner provided in section 20 of this chapter.

§ 190.4 Ballot; marking, effect of cross in circle.

Sec. 4. Marking a cross in the circle under the party name of a political party, at the general November election in a presidential year, shall not be deemed and taken as a direct vote for the candidates of the said political party for president and vice-president or either of them, but, as to the presidential vote, as a vote for the entire list or set of presidential electors chosen by that political party and certified to the secretary of state as in this chapter provided.

MISSOURI

Revised Statutes of Missouri 1949:

§ 111.420. Form of ballot—sample.—1. Every ballot printed under the provisions of this chapter shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in

the column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. The names of the candidates of the several political parties for electors of president and vice-president shall not be printed on the ballot, but shall after nomination, be filed with the secretary of state.

2. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. The respective party state committees shall certify in writing the nominations of such presidential and vice-presidential candidates to the secretary of state at some time before the secretary of state is required by law to certify the candidates of the several political parties and groups of petitioners to the several clerks of the county court or to election commissioners. In presidential years an instruction shall be on the ballot as follows: "A vote for names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state."

NEBRASKA

Revised Statutes of Nebraska, 1943:

§ 32-219. Presidential electors; how chosen. In the year 1944 and every four years thereafter, at the general election held on such day as Congress may appoint, each presidential elector nominated by any party or group of petitioners shall receive the combined vote of the electors of the state for the candidates for President and Vice President of such party or group of petitioners, and a vote cast for the candidates for President of the United States shall be a vote for the electors of the respective party or group of petitioners.

§ 32-503. Ballots; form. . . . (3) if the election be in a year in which a President of the United States is to be elected, in spaces separated from the foregoing by a heavy black line and entitled "Presidential Ticket" in black type not less than eighteen point, shall be the names and spaces for voting for candidates for President and Vice President; the names of candidates for President and Vice President for each political party shall be grouped together, each

group enclosed with brackets with one square to the left in which the voter indicates his choice, and the party name to the right according as near as possible to the following form or schedule:

JOHN DOE, President
( ) Republican
RICHARD ROE, Vice President

with a heavy line across the column, separating the group of the different political parties; no blank lines are to be left for writing in names for President and Vice President; . . .

NEW HAMPSHIRE

Public Laws of New Hampshire, 1943, page 13, approved February 9, 1943:

§ 1. Biennial Election Ballots. Amend section 3 of chapter 34 of the Revised Laws by striking out all of said section and inserting in place thereof the following new section: 3. Contents. Every ballot shall contain the name and residence of each candidate who has been nominated in accordance with law, except as hereinafter provided, and shall contain no other name except party appellations. The names and addresses of the presidential electors shall not be printed on the ballot, but in lieu thereof the names of a party's candidates for president and vice-president shall be printed thereon under the designation "Electors of president and vice-president of the United States." In case a nomination is made by nomination papers, the words, Nom. Papers, shall be added to the party appellation.

NEW JERSEY

Revised Statutes Cumulative Supplement of New Jersey, Title 19:

§ 19:14-11. Arrangement of nominees for electors of president and vice-president; directions to voters. The surnames of candidates for president and vice-president of the United States shall be printed in one line preceded by the words "presidential electors for." In the nomination by petition columns the surnames of candidates for president and vice-president shall be followed by the designation mentioned in the petitions filed. In the personal choice

column the voter may write or paste the surnames of candidates for president and vice-president for whom he desires the electors to vote. To the left of the surnames of candidates for president and vice-president of the United States, shall be printed a square, one-half inch in size, accompanied by the following directions to the voter: "To vote for all the electors of president and vice-president mark a crosso or plus within the square opposite the surname of president and vice-president."

§ 19:14-4. Head of the ballot; form and contents; instructions. . . .

7. To vote for all the electors of any party, mark a cross or plus in black ink or black pencil in the square at the left of the surnames of the candidates for president and vice-president for whom you desire to vote.

NORTH CAROLINA

General Statutes of North Carolina of 1943:

§ 163-108. Arrangement of names of presidential electors.—The names of candidates for electors of president and vice-president of any political party or group of petitioners, shall not be placed on the ballot, but shall after nomination be filed with the secretary of state. In place of their names there shall be printed first on the ballot the names of the candidates for president and vice-president, respectively, of each party or group of petitioners and they shall be arranged under the title of the office. A vote for such candidates shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state.

PENNSYLVANIA

Purdon's Pennsylvania Statutes Annotated, Title 25:

§ 2878. Presidential electors; selection by nominees; certification; vacancies.

The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled

to. If for any reason the nominee of any political party for President of the United States fails or is unable to make the said nominations within the time herein provided, then the nominee for such party for the office of Vice-President of the United States shall, as soon as may be possible after the expiration of thirty days, make the nominations. The names of such nominees, with their residences and post-office addresses, shall be certified immediately to the Secretary of the Commonwealth by the nominee for the office of President or Vice-President, as the case may be, making the nominations. Vacancies existing after the date of nomination of presidential electors shall be filled by the nominee for the office of President or Vice-President making the original nomination. Nominations made to fill vacancies shall be certified to the Secretary of the Commonwealth in the manner herein provided for in the case of original nominations.

In the official ballot form prescribed by Section 2963 of Title 25, supra, the following instruction appears:

"To vote for a person whose name is not on the ballot, write or paste his name in the blank space provided for that purpose. A cross mark in the square opposite the names of the candidates of any party for President and Vice-President of the United States indicates a vote for all the candidates of that party for presidential elector. To vote for individual candidates for presidential elector, write or paste their names in the blank spaces provided for that purpose under the title 'Presidential Electors.'"

RHODE ISLAND

Public Laws of Rhode Island, 1939-1940, page 739, chapter 818, provides for the use of voting machines in general elections. Section 1 of this Act provides in part as follows:

"Sec. 3. Any type or make of voting-machine approved by the board of elections must meet the following requirements: . . .

"It may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation, and a ballot therefor containing only the words 'Presidential electors for' preceded by the name of that party and followed by the names of the candidates thereof for the offices of president and vice president, and

a registering device therefor which shall register the vote cast for said electors when thus voted collectively; *provided, however*, that means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party, and on part for those of one or more other parties or in part or in whole for persons not nominated by any party; . . .

WASHINGTON

Public Laws of Washington, 1935, page 45, chapter 20, approved February 23, 1935:

Section 1. In the years in which presidential elections are held each political party nominating candidates for president and vice-president of the United States and electors of the same shall file with the secretary of state certificates of nomination of such candidates at the time and in the manner and number provided by law. The secretary of state shall certify to the county auditors the names of the candidates for president and vice-president of the several political parties, which shall be printed on the ballot. The names of candidates for electors of president and vice-president shall not be printed upon the ballots. The votes cast for candidates for president and vice-president of each political party shall be counted for the candidates for presidential electors of such political party, whose names have been filed with the secretary of state.

WISCONSIN

Wisconsin Statutes 1949:

§ 6.23. . . . (9) In each year in which there is to be elected a president and vice-president of the United States, there shall be printed and provided for use in each precinct at the general election a separate ballot, to be designed "Presidential Ballot," which shall be substantially in the form annexed, marked "C," except the party candidates shall be arranged from top to bottom according to rank in obtaining votes at the last preceding general election for governor, that is, the party receiving the largest vote will be placed first and the others in their corresponding position. The order of names of independent candidates for president and vice president shall be alphabetical according to the candi-

date for president, and such names shall follow the names of the party candidates for such offices.

(10) (a) At the top of each presidential ballot shall be placed in letters of not less than three-eighths of an inch in length the words "Official Presidential Ballot." Underneath the words "Official Presidential Ballot" and in plain, legible type shall appear the following instruction to voters: "Make a cross (X) or other mark in the square opposite the name of the candidates for whose electors you desire to vote. Vote in ONE square only."

NEW YORK

The New York Election Law, Section 248, prescribes the form of ballots to be used on voting machines. This section reads in part as follows:

"The party emblem for each political party represented on the machine, which has been duly adopted by such party in accordance with this chapter, and the party name or other designation, and a designating letter and number shall be affixed to the name of each candidate, or, in case of presidential electors, to the names of the candidates for president and vice-president of such party. . . ."

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No. 649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, as Chairman of the State Democratic Executive Committee of Alabama, *Petitioner,*

v.

EDMUND BLAIR, *Respondent.*

PETITIONER'S BRIEF ON THE MERITS.

On Writ of Certiorari to the Supreme Court of Alabama.

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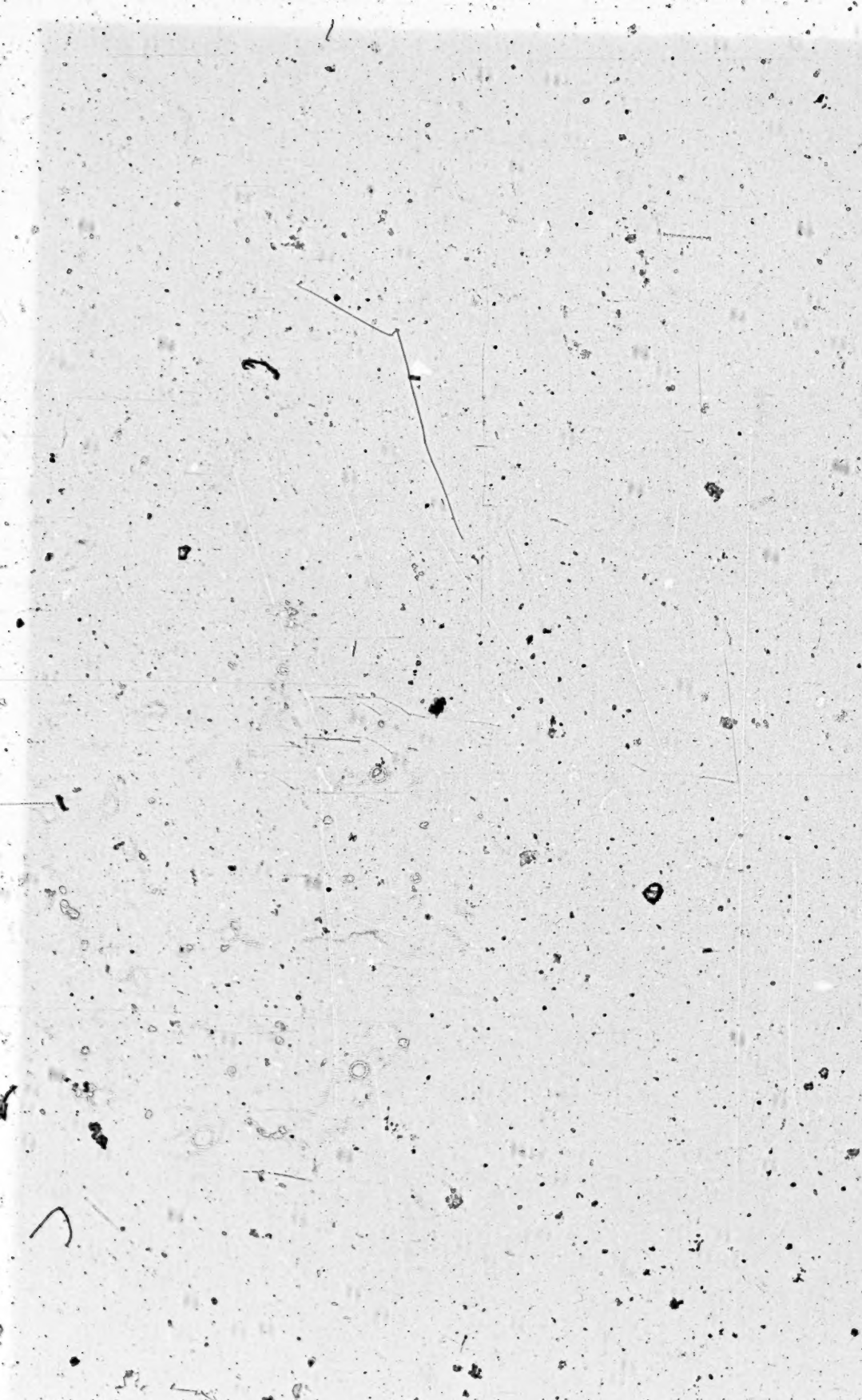

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Provisions of the United States Constitution Involved	2
Alabama Statutes and Administrative Regulations Involved	4
Statement	4
Summary of Argument	6
Argument	7
Conclusion	20
Appendix "A"—Alabama Election Statutes	21
Appendix "B"—	
Item One: Resolution Adopted by the Alabama Democratic Executive Committee	31
Item Two: Rules of the Democratic Party of Alabama	37
Appendix "C"—	
Statutes of 21 States Omitting Electors Names from the Ballot	44
Appendix "D"—	
Historical Material on the Role of Electors	57

CITATIONS

Cases:

Day-Brite Lighting, Inc. v. *Missouri*, 342 U. S. ——, 96 L. Ed. (Adv.) 343, March 3, 1952 15
Hodges v. *Bryan*, 149 Ky. 110, 148 S. W. 21 (1912) 18
In re Green, 134 U. S. 377, 379 (1890) 6, 12
McPherson v. *Blacker*, 146 U. S. 1 (1892) 6, 9, 10, 11, 12, 13, 14, 20
Ray v. *Blair*, —— Ala. —— 1, 5, 7, 9, 19

Page

Seay v. *Latham*, 143 Tex. 1, 182 S. W. (2d) 251 (1944) 17, 19, 20
Schnell v. *Davis*, 336 U. S. 933 (1949), affirming 81 F. Supp. 872, 878 (S. D. Ala. 1949) 11
Smith v. *Allwright*, 321 U. S. 649 (1944) 11
Spreckles v. *Graham* 194 Cal. 516, 531, 228 P. 1040, 1045 (1924) 18
State ex rel. Hawke v. *Myers*, 130 O. St. 18, 4 N. E. (2d) 397 (1936) 16
State ex rel. Nebraska Republican Committee v. *Wait*, 92 Neb. 313, 138 N. W. 159 (1912) 16
Thomas v. *Cohen, et al.*, 146 Misc. 835, 262 N. Y. S. 320 (1933) 16
Walker v. *U. S.*, 93 F. (2d) 383 (CCA 8th, 1937), cert. denied 303 U. S. 643 20

CONSTITUTION AND STATUTES:

U. S. Constitution Art. II, Sec. 1 ..... 2, 6, 7, 8, 9, 11, 13
U. S. Constitution, Twelfth Amendment 2, 3, 5, 7, 8, 9, 14, 19

Title 17, Code of Alabama 1940
Section 336 ..... 4, 19
Section 344 4
Section 345 4
Section 347 ..... 4, 5
Section 348 4
California Election Code
Section 10555 15
Oregon Code, Section 81-503 (a) 15
28 U. S. C., Section 1257 (3) 1

MISCELLANEOUS:

43 L. R. A. (N. S.) 284, 287 18
26 Harvard Law Review 353 18
Johnsen, *Direct Election of the President* (1949), p. 17 ..... 16, 20
1 Morison and Commager, *Growth of the American Republic*, p. 291 14
2 Story, *Constitution*, 5th Ed., p. 312 12

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v.

EDMUND BLAIR, *Respondent*.

On Writ of Certiorari to the Supreme Court of Alabama.

PETITIONER'S BRIEF ON THE MERITS.

OPINIONS BELOW.

The opinion of the Circuit Court of Jefferson County, Alabama (R. 142) is unreported. The opinion of the Supreme Court of Alabama (R. 159) is not yet reported.

JURISDICTION.

The judgment of the Supreme Court of Alabama was entered on February 29, 1951. (R. 175) A stay of the orders of the Courts below, and a petition for a writ of certiorari, were granted by this Court on March 24, 1952. (R. 177) The jurisdiction of this Court rests on 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED.

1. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a state, by legislative or administrative action, or by a combination of legislative and administrative action, from requiring presidential electors to cast their electoral votes for President and Vice-President of the United States for the candidates of the political party under the auspices of which the electors were elected?

2. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution prohibit a political party from requiring its candidates for presidential elector, as a condition for seeking primary nomination as such candidates, to pledge that if elected they will vote for the presidential and vice-presidential nominees of the party?

Conversely, do those provisions of the Federal Constitution require that a political party permit a person to become a candidate for the party's nomination for presidential and vice-presidential elector, even though that person states that if elected he will *not* cast his electoral ballot for the party's nominees for President and Vice-President?

3. Do Article II, Section 1, and the Twelfth Amendment of the United States Constitution create constitutionally protected and legally enforceable rights in favor of a person seeking primary nomination as candidate for presidential elector?

4. Has the Supreme Court of Alabama correctly interpreted and applied Article II, Section 1, and the Twelfth Amendment of the United States Constitution?

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED.

1. The relevant provisions of Article II, Section 1, of the United States Constitution are as follows:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,

equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

2. The relevant provisions of the Twelfth Amendment of the Constitution are as follows:

"The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a ma-

jority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

ALABAMA STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED.

The general framework of Alabama election law can be summarized as follows:

Alabama's Democratic electors are nominated by primary election. This is not compulsory, but a matter for determination by the governing body of the party. Title 17, Section 336, Code of Alabama 1940. That body may set political and other qualifications for primary participation as voter or candidate. Title 17, Section 347, Code of Alabama. A candidate in a primary election must be eligible to vote and politically qualified in order to secure a place on the ballot. Title 17, Section 345, Code of Alabama. The Committee Chairman must certify the names of candidates to the Secretary of State forty days prior to the primary election. Title 17, Section 344, Code of Alabama. But he is to receive and certify only declarations of candidacy "in the form prescribed by the governing body of the party." Title 17, Section 348, Code of Alabama.

The relevant Alabama statutes, and the administrative regulations adopted pursuant to such statutes, are printed in Appendix "A" and Appendix "B," *infra*.

STATEMENT.

One of the basic Alabama statutes governing primary elections provides that "every state executive committee of a party . . . shall, in its own way, declare and determine

who shall be entitled and qualified to vote in such primary election, or to be candidates therein . . ." (Alabama Code, Title 17, Section 347). Pursuant to this statute and the other provisions of Alabama election law, the Alabama Democratic Executive Committee[1] resolved, among other things, that each candidate for Democratic nomination must pledge himself to "aid and support . . . the nominees of the National Convention of the Democratic Party for President and Vice-President . . ." (R. 10)[2]

Respondent Blair applied to the Petitioner, as Chairman of the Alabama Democratic Committee, for certification as a candidate for nomination as Presidential elector on the Democratic ticket. Blair failed and refused, however, to pledge his aid and support to the nominees of the Democratic National Convention, as required by the Committee pursuant to state law. Blair instead substituted in his declaration of candidacy a statement that he would "not cast an electoral vote for Harry S. Truman or for any one who advocates the Truman-Humphrey Civil Rights Program." (R. 4)

Petitioner did not certify the Respondent's name to the Secretary of State, and Respondent thereupon petitioned for a writ of mandamus in the Circuit Court of Jefferson County. (R. 3) That court, after hearing, ordered the Petitioner to certify Respondent's name to the Secretary of State as a candidate for Presidential elector on the Democratic ticket. (R. 51) The Supreme Court of Alabama affirmed the judgment and order of the Circuit Court, on the theory that the Twelfth Amendment of the Federal Constitution "confers on electors freedom to exercise their judgment in respect to voting in the electoral college for a President and Vice President." (R. 162)

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[1] Hereafter referred to as the "Committee".

[2] The resolution adopted by the Committee on January 26, 1952 is set out in Appendix "B" hereto.

SUMMARY OF ARGUMENT.

1. The decision below conflicts with, and jeopardizes, the historical policy of the Constitution and the operation of the electoral processes of this country, whereby there is committed to the State legislatures the procedure for the selection of presidential electors.

2. The Constitution expressly provides that: "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a number of Electors . . ." Article II, Section 1. (Emphasis added.)

3. Pursuant to this provision of the Constitution, at least twenty-one states have adopted statutes which wholly omit from the ballot the names of candidates for elector. In addition, statutes in California and Oregon require electors to vote for their party's nominees for President and Vice President. See pp. 15-16, *infra*. These statutes are collected in Appendix "C" hereto.

4. This Court has expressly held, in *McPherson* v. *Blacker*, 146 U. S. 1 (1892), that the state legislatures have, under Article II, Section 1, "plenary power . . . in the matter of the appointment of electors."

5. Accordingly, there is no Constitutional basis for the decision below, since the Constitution does not prohibit the action which Alabama has taken.

6. This Court, in *In re Green*, 134 U. S. 377 (1890), has recognized the true role of a Presidential elector and has said:

> "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation."

7. If the decision below is allowed to stand, the practical effect will be the disfranchisement of the average voter. Such a voter, under the decision below, can no longer have any assurance that his vote will be of benefit to the Presidential nominee of his choice.

8. Even if it were true that the Constitution itself guarantees to a duly elected elector freedom to vote for the President of his choice, it does not follow that the same freedom would extend to one who seeks to be a candidate in the primary of a given political party.

ARGUMENT

The Alabama Supreme Court has struck down, on grounds of unconstitutionality, a state procedure for nominating presidential and vice presidential electors under which the candidates are required, as a condition of candidacy for nomination in the Democratic primary, to pledge to support the nominees of the National Convention of the Democratic party. The Court below held that the procedure violates Article II, Section 1 and the Twelfth Amendment of the Constitution.

The court below has erroneously interpreted and applied Article II, Section 1, and the Twelfth Amendment. The decision below conflicts with opinions of this Court and of other courts, with legislative enactments, and with long standing custom and tradition in this country. In terms of consequences, the Alabama holding effectively deprives the voters of Alabama of the opportunity to choose a President and Vice President of the United States. Electorates in all other states are also directly affected. The efficacy of the two-party system is dangerously imperiled.

The Supreme Court of Alabama has declared that the Constitution of the United States guarantees absolute discretion to Presidential electors to cast their electoral vote for anyone they please. And the Supreme Court of Alabama has held that by Constitutional command this discretion may not be restricted by a political party, operating pursuant to state law, even to the extent of exacting a pledge from persons seeking to become candidates for elector in the party's primary that if elected they will support the nominees for President and Vice-President selected by the National Convention of the party.

The Supreme Court of Alabama has decided this question in a way that runs counter to more than one hundred

and fifty years of custom and tradition in the nomination and election of Presidential electors.

For more than a century and a half the voters of this country have registered, in effect, a direct choice for President and Vice-President of the United States. Electors have consistently and uniformly done no more than reflect the wishes of the parties under whose auspices they have run for office. This tradition is so well established that in twenty-one of the states electors' names do not appear on the ballot; the voter marks his ballot for the actual Presidential and Vice-Presidential nominees. (For a collection of the statutes of such states, see Appendix "C".)

The decision of the Supreme Court of Alabama takes from the voters this awesome power of electing the President and Vice-President of the United States, and holds that this power is in the electors to be exercised absolutely, without requisite response to the registered will of the voters. The decision holds, moreover, that any restraint on the unbridled discretion or caprice of the individual elector is forbidden by the Constitution of the United States.

This decision below, placing a novel judicial construction on Article II, Section 1, and the Twelfth Amendment of the United States Constitution, effects a profound change in the relationship of the voters of this country to the highest elective offices in the land. Every decision of the highest court of a state interpreting the Federal Constitution has repercussions that are nation-wide. This is especially true in the present case, since the decision of the Alabama court affects the election of the President and Vice-President of the United States and has as direct and as vital an effect on the voters of Oregon or Massachusetts as on the voters of Alabama. Obviously in the election of President and Vice-President, the electoral votes of one state are equally important to those interested in the election as are the same number of electoral votes from any other state. This Court should not permit the novel and sweeping decision below to stand. A state

court's holding of unconstitutionality, in order to have merit, should be based on some explicit command in the Constitution.

But neither the letter of the Constitution nor its history justifies or requires, in the case at bar, a decision uprooting these long-established state practices and stabbing at the heart of our political system as it has evolved over the years.

The fundamental fallacy in the opinion below is an assumption that there is a restriction of some sort in the Federal Constitution prohibiting any control of an elector's discretion. According to the Alabama Court, the "plain logic of the situation" and the "plain meaning of the Twelfth Amendment" required the Court to hold the state action unconstitutional. (R. 164) It is difficult to identify the "plain logic" and the "plain meaning" to which the Court below refers. Article II, Section 1, as originally adopted in 1787, provided merely that: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . The Electors shall meet in their respective States, and vote by Ballot for two Persons . . ." The Twelfth Amendment provides: "The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . ."

Perhaps the "plain meaning" and "plain logic" to which the Alabama Court refers is to be distilled from the arid words "meet" and "vote". If this is what the Court had in mind, there is no apparent reason why an elector who is pledged to support the nominee of is party is thereby prevented from both meeting and voting.

But Article II, Section 1 and the Twelfth Amendment do not support the construction and application of the Alabama Court.

The key phrase in Article II, Section 1 is the phrase which specifies that in each state the electors are to be appointed "in such Manner as the Legislature thereof may direct." This clause is a grant of plenary power to the State legislatures to appoint electors. In *McPherson* v.

Blacker, 146 U. S. 1, 35, this Court said of Article II, Section 1:

> "(T)he practical construction of the clause has conceded plenary power to the State Legislatures in the matter of the appointment of Electors . . . In short, the appointment and mode of appointment of Electors belong exclusively to the States under the Constitution of the United States."

In the *McPherson* case, the issue before this Court was the constitutionality of a Michigan statute. This statute provided that the electors from Michigan should be selected, not from the state at large, but one from each Congressional district, plus one elector from the eastern half of the state, and plus a second elector from the western half of the state. This Michigan statute was challenged on the ground that it was unconstitutional for the state to deny to each and every voter in the state the opportunity of voting for each and every elector.

Just as in the case at bar, this Court in *McPherson* v. *Blacker* was not called upon to decide whether the action of the state legislature was a good thing or a bad thing. The question for decision in this Court was then, and is now, simply whether the state action exceeded any constitutional limitation. As this Court remarked under the closely related circumstances of the *McPherson* case:

> "We repeat that the main question arising for consideration is one of power and not of policy, and we are unable to arrive at any other conclusion than that the act of the Legislature of Michigan of May 1, 1891, is not void or in contravention of the Constitution of the United States for want of power in its enactment." 146 U. S. 1, 41-42.

The Court is concerned in the present case, as in the *McPherson* case, with the dimensions of a state's power to determine the manner in which Presidential electors are selected. In this respect the *McPherson* case is not wholly identical with the present case in that *McPherson* presented the question of the constitutionality of a state statute, whereas in the present case, the issue presented involves both the

constitutionality of a statute, and the constitutionality of administrative action taken pursuant to that statute.[3]

This Court in *McPherson* discussed the intent of the framers with respect to Article II, Section 1, and demonstrated that there was a "contrariety of views" among the various delegates to the Constitutional Convention. This Court there said:

> "The Journal of the Convention discloses that propositions that the President should be elected by 'the citizens of the United States,' or by the 'people,' or 'by electors to be chosen by the people of the several states,' instead of by the Congress, were voted down . . . as was the proposition that the President should be 'chosen by electors appointed for that purpose by the legislatures of the states,' though at one time adopted. . . . Gerry proposed that the choice should be made by the state executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views *by leaving it to the state legislatures* to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by

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[3] In *Smith* v. *Allwright*, 321 U.S. 649, this Court considered and discussed the question of whether or not action by a political party pursuant to state statute constituted state action. In that case, the Court said: "(S)tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." (p. 660). Further:

> "Primary elections are conducted by the party under state statutory authority . . . We think that this statutory system for the election of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state insofar as it determines the participants in a primary election." (p. 663)

The state election statutes of Alabama, like the Texas election statutes which were before this Court in *Smith* v. *Allwright*, vest the State Executive Committee of the Party with authority over the party primary.

In *Schnell* v. *Davis*, 336 U. S. 933 (1949), this Court affirmed *per curiam* a decision of a three-Judge District Court in which the status of the Alabama Democratic Executive Committee was extensively discussed. The District Court said: "The State Democratic Executive Committee is an official arm of the State and its action constitutes state action. *Smith* v. *Allwright*, *supra*." *Davis* v. *Schnell*, 81 F. Supp. 872, 878 (S. D. Ala. 1949).

> general ticket, or as otherwise might be directed." (Emphasis supplied) 146 U. S. 1, 28.

In other words, in the *McPherson* case the Court conceded that the debates at the Constitutional Convention did not make the issue clear beyond all possible doubt, because of the conflicting viewpoints of the various persons who attended the Convention.

As this Court indicated in *McPherson*, the final draft of the Constitution represented a compromise of conflicting views on the method of electing a President. The outstanding fact emerging from any historical analysis of these sections, as this Court recognized in *McPherson*, is that the framers intended that the individual states should prescribe the method of appointing electors. Indeed, the constitutional silence on the matter of free electoral choice may well have been purposeful and essential since some of the leading framers strongly advocated a direct election of the President.[4]

Even more explicit than the *McPherson* language was the statement of this Court in *In re Green*, 134 U. S. 377, 379: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation." To the same effect, see Justice Story:

> ". . . (N)othing is left to the electors after their choice but to register votes which are already pledged; and an exercise of an independent judgment would be treated as a political usurpation, dishonourable to the individual, and a fraud upon his constituents." (2 Story, *Constitution*, 5th Ed., p. 312.)

Complementing Justice Story's observation, this Court said in *McPherson*:

> "Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment

[4] Because of this Court's extremely detailed and comprehensive review of the history of Article II, Section 1, as set forth in *McPherson* v. *Blacker*, no further review of such history in this brief would seem to be required.

> in the selection of the Chief Executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors the original expectation may be said to have been frustrated . . . the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time . . ." 146 U. S. 1, 36.

In view of the unanimous decision of this Court in the *McPherson* case, it would appear that any original intention on the part of some of the framers of the Constitution that electors *should* exercise their own independent judgment has long since been dissipated in practice. On the other hand, it is not necessary for Petitioner to prove, nor does he seek to prove, that the framers of the Constitution intended to *deny* freedom of choice to Presidential electors. Rather, the question here is whether a state may constitutionally do what Alabama and the other states have done throughout the history of the United States.

As far as the history of the Constitutional Convention of 1787 is concerned, it is entirely possible that some of the framers of the Constitution intended that the Presidential electors should have freedom of choice, if the Legislature of a given state should see fit to give such freedom of choice to the electors from that particular state. However, as was so clearly pointed out by this Court in *McPherson*, even though this may have been the intention of some of the framers of the Constitution, the actual application and construction of the Constitutional provisions on this particular point have been subject, over the years, both to judicial interpretation and to the emergence and growth of the two party system. The result, as pointed out by this Court in *McPherson*, is that "the practical construction of the clause [Article II, Section 1] has conceded plenary

power to the state legislatures." 146 U. S. 1, 35. Also, the Court expressly based its decision in *McPherson* on the fact that "the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers and not arising in their time . . ." (p. 36) The outstanding "condition" which arose in this country, very shortly after 1787, was the emergence and growth of political parties. Speaking to this subject in their work entitled "Growth of the American Republic", Morison and Commager said:

> "Political parties have made the nominations since 1792, and the presidential electors merely register the will of the state pluralities. That they should do so is now an unwritten convention quite as strong as any provision of the written constitution; and, although some state legislatures appointed presidential electors as late as 1860, a popular vote has become the accepted and universal method. It is interesting to note that in this one department where the Federal Convention was largely without experience, it created a clumsy system which had to be supplemented by the Twelfth Amendment and by the intervention of political parties." 1 Morison and Commager, *Growth of the American Republic*, p. 291.[5]

As is evident from the material set out above and in Appendix "D", it is no new system that the Court below has struck down. It is a system which has grown up in this country over a period of more than 150 years—a system founded on the express constitutional provision that each State shall appoint its electors "in such manner as the Legislature thereof may direct." And it is a system which became, at an early stage in our history, as political parties emerged and grew, an essential element in the development of a truly representative democracy.

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[5] For a collection of historical material relating to the role of Presidential electors and the growth of political parties, see Appendix "D" hereto.

This, then, is the system which the Court below through its revolutionary decision, would strike down. It is incumbent upon Respondent, who has attacked the constitutionality of the Alabama statute and the administrative action taken thereunder, to establish that the system in effect throughout the 48 States is in violation of the Constitution. And as this Court pointed out in *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. —, 96 Law. Ed. (Adv.) 343, 345, March 3, 1952, the constitutionality of state action shall be upheld "so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided." In the *Day-Brite* case, this Court considered a Missouri statute, dealing with the subject of elections. The Court upheld the constitutionality of the statute, against an attack based on a claim of unconstitutionality, on the strength of the judicial principle that state action carries a presumption of validity.

The historical development of the electoral system outlined above has been reflected in legislation in many states. Statutes in California and Oregon require electors to vote for their party's Presidential and Vice Presidential nominees.

The California Election Code, Section 10555, provides:

> 'The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice-President of the United States, who are, respectively, the candidates of the political party which they represent . . .''

The Oregon Code, Section 81-503(a) provides:

> "Said candidates (for presidential electors) shall pledge themselves, if elected, to vote for their party's nominee for President and Vice-President of the United States in the electoral college."

The legislatures of twenty-one states have refused to tolerate the fiction of electoral discretion, and have provided that the names of the electors shall not appear on the

ballots at all. (See Appendix "C.") The Supreme Court of Ohio in *State ex rel Hawke* v. *Myers*, 132 O. St. 18, 4 N. E. 2d 397 (1936), upheld the constitutionality of an Ohio act placing only Presidential and Vice Presidential candidates on the ballot. Similar provisions for New York voting machines were sustained in *Thomas v. Cohen, et al.*, 146 Misc. 835, 262 N. Y. S. 320 (1933), the Court stating that mandamus would probably lie to force an elector to vote for his party's nominee for President and Vice-President. (262 N. Y. S. 326).

A recent study of our system for electing Presidents has described the situation which prevails nationally:

> "In 27 States candidates for Presidential electors are nominated by party conventions, in 7 by party primaries, and in 11 by party committees. The laws of Arkansas and North Carolina permit nominations either by party convention or primary. Pennsylvania has a unique and very realistic system in that the law provides that the presidential candidate of each party shall nominate the presidential electoral candidates for his party. The electors nominated in these various ways are, in elections, expected, and in some States required by law, to vote for their party's candidate. Three States, Caliornia, Oregon, and Massachusetts, go far as to bind their electors by law." [6]

Neither the letter of the Constitution nor its history justifies or requires a decision uprooting these long-established state practices.

Even in the absence of statutory mandate, courts of various states have required, in effect, that electors vote for their party's nominee.

The decision below is in direct conflict with the decision of the highest court of Nebraska in *State ex rel: Nebraska Republican Committee* v. *Wait*, 92 Neb. 313, 138 N.W. 159 (1912). That court affirmed an order to the Nebraska Secretary of State to remove from the Republican column

[6] Johnsen, "Direct Election of the President" (1949), p. 17.

on the ballot electors pledged to Roosevelt, and to replace them with electors pledged to Taft.

The decision below also conflicts with the decision of the highest court of Texas in *Seay* v. *Latham*, 143 Tex. 1, 182 S.W. 2d. 251 (1944).

It is little short of fraudulent for electors to run under the Democratic column, and then be able to vote in the electoral college for nominees of other parties. There are other practical reasons why electors should be required to vote for the national party nominee. The decision below would permit Presidential electors to vote in the Electoral College in complete disregard of the poitical party under whose auspices they run. As a result, the average voter, who ordinarily votes for the Presidential nominee of a given party, would lose the means of making his vote effective. If the candidates for elector of that party refused, as here, to pledge party loyalty, the voter would be effectively disfranchised. Even if no pledge were required, the voter would have no assurance, under the decision below, that his vote would have the result he intends. The great majority of voters know only the Presidential nominee for whom they wish to vote. They know little and care less as to who are the various candidates for electors, and undoubtedly *assume* that a vote for electors under a given party banner means a vote for the Presidential nominee of that party. The decision below, in holding unconstitutional the effort of the party to articulate this assumption in the form of a pledge of party loyalty, has struck not only at the pledge but at the basis of the silent assumption itself. This time-honored assumption would of course be forever undermined if candidates for elector could claim a constitutional right to disregard party ties—as held by the Alabama courts.

In other words, because of years of custom, the people have considered the merits of only the candidates for President and Vice-President. Usually, most of the voters know nothing of the persons who are candidates for electors. And they have ignored the electoral candidates for a good reason:

> "They (the electors) have no duties to perform which involve the exercise of judgment in the slightest degree . . . Their sole function is to perform a service which has come to be nothing more than clerical—to cast, certify, and transmit a vote already determined . . . They are in effect no more than messengers whose sole duty is to certify and transmit the election returns."
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> *Spreckles* v. *Graham*, 194 Cal. 516, 531, 228 P. 1040, 1045 (1924).

See also: *Hodge* v. *Bryan*, 149 Ky. 110, 148 S.W. 21 (1912). The reasoning of these two cases is designed to show that electoral duties are so perfunctory that the electors should be nominated by convention even though nominations for state and public offices generally are made by primary election.[7]

Turning now from the broad public policy implications of the decision below, a brief discussion of the dissenting opinion below would seem to be appropriate. That opinion advanced the theory that, even granting that a duly elected Presidential elector might have freedom of choice under the Constitution, it did not follow that this freedom of choice extended to a prospective candidate who wished to reach the electoral college by running in the primary of a given political party.

The dissenting Justices said:

> "The Petitioner [Respondent here] is not a presidential elector. He is merely asserting a right to be-

[7] The following annotation at 43 L.R.A. (N.S.) 284, is pertinent:

"Irrespective of whether any power can legally compel the elector to vote the will of either his national party or his state party, it is obvious that a state may enact such election laws as will practically prevent the election of any man not morally bound to vote for the nominees of his party's national convention, or in the same way it might secure the election of men who are obliged to vote the will of the state party."

And further (p. 287):

"The purpose of such legislation is briefly stated in 26 Harvard Law Review, p. 353: 'But the whole purpose of conferring the right to use the party name on the ballot is to enable voters, without personal knowledge of the individual nominee, to vote for men supporting the party principles. If the representation of the ballot is deceptive, the law is more than nullified. There is certainly no injustice to the nominee in depriving him of his right when he is making an unconscionable use of it to defraud the voters.'"

come a candidate in the Democratic Primary and his act in filing his application for candidacy is purely of his own volition . . . He is seeking to become a candidate in a Democratic primary without complying with the resolution duly adopted by the State Democratic Executive Committee. He is not an elector chosen by the State of Alabama and is not within the ambit of the Twelfth Amendment to the Constitution of the United States. . . .

"Conceding that the Federal Constitution does safeguard to a presidential elector the right of free and independent choice in the electoral college, we are unable to see that this principle would inhibit a political party from fixing the qualifications of a candidate desiring to run in a party primary election. It would give such a candidate no right to become an elector via any particular political party route unless he meets the qualifications prescribed by the party. Though such a candidate, after having been elected as an elector in the general election, might have the right to cast his free ballot in the electoral college, Amendment Twelve of the Constitution guarantees him no right to go to the college by any certain primary election route." (R. 171, 172)

In this connection, it is worthy of note that the Alabama Democratic Executive Committee could have selected its candidates for elector according to the sole criterion of whether or not these candidates would pledge support to the Presidential and Vice-Presidential nominees of the Democratic National Convention, without submitting the matter to the voters at a primary election. Title 17, Alabama Code, Section 336. See e.g., *Seay* v. *Latham*, 143 Tex. 1, 182 S.W. 2d 251, 1944.[8]

[8] In *Seay* v. *Lathan*, *supra*, the May Texas Democratic Convention selected 23 electors who were absolved from obligation to support the nominees of the Democratic National Convention. Their names were certified to the Secretary of State. The National Convention nominated Roosevelt and Truman. Fifteen of the May nominees announced that they would not vote for Roosevelt and Truman in the electoral college. Thereupon the State party held a September convention, withdrew the nomination of the "May fifteen" and nominated fifteen substitutes, who would support the nominees of the National Convention. Mandamus issued to the Secretary of State to compel him to replace the previously certified "May nominees" with the "September nominees."

The Texas court stated the matter was clearly one "within the inherent power of the Party." (182 S.W. 2d 255.) Further: "The power to determine

Since the Alabama Democratic Executive Committee could have constitutionally selected candidates for elector in this manner,[9] pursuant to Alabama law, there should be no taint of unconstitutionality in the more democratic solution which the Committee adopted, in leaving the matter to the voters at the primary election—subject only to the limitation that candidates desiring to run for Presidential elector in the Democratic primary should pledge their willingness to support the Presidential and Vice-Presidential nominees selected by the National Convention of the Democratic Party.

CONCLUSION.

For the reasons stated in this brief and in the Petition for Certiorari previously filed herein, it is respectfully submitted that the judgment of the court below should be reversed and rendered.

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the policies of the Party, including the power to determine who shall represent it in the selection of the President and Vice-President of the United States, when not otherwise provided by statute or by rule of the association, resides in the State Convention of the Party." (182 S.W. 2d 253.) And again: "A presidential elector is selected by the Party as its nominee primarily to effectuate its policies and register its will in respect to a particular candidate. *McPherson* v. *Blacker*. . . ."

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[9] See *McPherson* v. *Blacker*, 146 U.S. 1 (1892); *Seay* v. *Latham*, 143 Tex. 1, 182 S.W. 2d 251 (1944). Cf. Johnsen, "Direct Election of the President" (1949), p. 17:

"In 27 states candidates for Presidential electors are nominated by party conventions; in 7 by party primaries, and in 11 by party committees."

And see *Walker* v. *United States*, 93 F. (2d) 383, 388 (C.C.A. 8, 1937), cert. den., 303 U.S. 643 (1938):

"The Federal Constitution does not provide that the selection of electors shall be by popular vote . . . It leaves it to the state legislature to define the method of effecting the object. *McPherson* v. *Blacker*, 146 U.S. 1."

APPENDIX "A."

RELEVANT ALABAMA ELECTION STATUTES APPEARING IN ALABAMA CODE, 1940, TITLE 17:

Sec. 1. Primary elections included in general law.—All the provisions of this article shall apply to all primary elections and all elections by counties or municipalities held in this state, except in cases where the provisions hereof are inconsistent or in conflict with the provisions of a law governing special primary, county or municipal elections.

Sec. 75. Presidential electors and congressmen; when elected.—Electors for president and vice-president of the United States shall be elected on the first Tuesday after the first Monday in November, 1940, and every fourth year thereafter; a member of congress from each congressional district shall be elected on the first Tuesday after the first Monday in November, 1940, and every second year thereafter.

Sec. 138. Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter shall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in Section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem.

Sec. 145. Names of candidates placed on ballots; certificate of nomination.—The probate judge of each county shall cause to be printed on the ballots to be used in their respective counties, the names of all the candidates who have been put in nomination by any caucus, convention, mass meeting, primary election, or other assembly of any political party or faction in this State, and certified in writing and filed with him not less than sixty days previous to the day of election. The certificate must contain the name of each person nominated and the office for which

he is nominated, and must be signed by the presiding officer and secretary of such caucus, convention, mass meeting, or other assembly, or by the chairman and secretary of the canvassing board of such primary election.

In case of a person to be voted for by the electors of the whole state or of an entire congressional district, judicial circuit, or senatorial district for any state or federal office, the certificate of nomination must be filed in the office of the secretary of state not less than sixty days before the day of election; and the secretary of state must thereupon immediately certify to the judge of probate of each county in the state, in case of an officer to be voted for by the electors of the whole state, and the judges of probate of the counties composing the circuit or district, in case of an officer to be voted for by the electors of a circuit or district, upon suitable blanks to be prepared by him for that purpose, the fact of such nomination and the name of the nominee or nominees and the office to which he or they may be nominated.

The judge of probate shall also cause to be printed upon the ballots, the name of any qualified elector who has been requested to be a candidate for any county or municipal office by written petition signed by at least twenty-five electors qualified to vote in the election to fill said office, when such petition has been filed with him before the first Tuesday in May in the year in which a state-wide primary election is held.

The secretary of state shall also certify to the judge of probate of the several counties, as the case may be, the name of any qualified elector who has been requested to be a candidate for any state or federal office by written petition signed by at least three hundred electors qualified to vote in the election to fill said office provided such petition is filed with the secretary of state before the first Tuesday in May in the year in which a state-wide primary election is held. The judge of probate shall cause to be printed upon the ballots, the name, or names, of such qualified elector or electors, as the case may be.

Provided, however, that the judge of probate of the several counties in this state are hereby prohibited from causing to be printed on the ballot to be used in their respective counties, the name of any independent candidate for any state, county, or federal office who has not filed his declaration to become such a candidate before the first

Tuesday in May in the year in which a state-wide primary election is held. (As amended)

Sec. 148. Ballots; how printed.—The ballots printed in accordance with the provisions of this chapter chall contain the names of all candidates nominated by caucus, convention, mass meeting, primary election, or other assembly of any political party or faction, or by petition of electors and certified as provided in Section 145 of this title, but the name of no person shall be printed upon the ballots who may, not less than twenty days before the election, notify the judge of probate in writing, acknowledged before an officer authorized by law to take acknowledgments, that he will not accept the nomination specified in the certificate of nomination or petition of electors. The name of each candidate shall appear but one time on said ballot, and under only one emblem.

Sec. 155. Ballots for independent candidates.—The elector may write in the column under the title of the office the name of any person whose name is not printed upon the ballot for whom he may desire to vote. In case of nomination by independent bodies, the ballot shall be so arranged that at the right of the last column for party nomination the several tickets of the names of the independent candidates shall be printed in one or more columns according to the space required, having above each of the tickets the political or other names selected to designate such independent nominations. The ballot herein provided shall be substantially in the following form, viz: . . .

Sec. 216. Day for holding special elections.—All special elections shall be held on such day as the governor may direct.

Sec. 222. Presidential electors and representatives in congress to be elected.—On the day prescribed by this Code there are to be elected, by general ticket, a number of electors for president and vice-president of the United States equal to the number of senators and representatives in congress to which this state is entitled at the time of such election; and there shall be elected one representative in congress for each congressional district.

Sec. 226. Electoral meeting and supply of vacancies. —The electors of president and vice-president are to

assemble at the office of the secretary of state, at the seat of government at twelve o'clock noon on the second Tuesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president, and those of them present at that hour must at once proceed by ballot and plurality of votes to supply the places of those who fail to attend on that day and hour.

Sec. 336. Election by party as to whether it will come within primary law.—A primary election, within the meaning of this chapter, is an election held by the qualified voters, who are members of any political party, for the purpose of nominating a candidate or candidates for public or party office. Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law. All political parties are presumed to have accepted and come under the provisions of the primary election law, but any political party may signify its election not to accept and come under the primary election law by filing with the secretary of state, at least sixty days before the date herein fixed for the holding of any general primary election, a statement of the action of its state executive committee, certified by its chairman and secretary, which statement shall contain a copy of the resolution or motion adopted declining to accept and come under the primary election law. If a political party declines to accept and come under the primary election law it shall not change its action and accept and come under the primary election law until after the next general election held thereafter. The state executive committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this chapter unless the method of their election is otherwise directed by the state executive committee of the party holding the election.

Sec. 339. Elections within primary law.—All primary elections hereafter held by any political party in this state for the nomination of any state, national, district, circuit, county or municipal officers, shall be held and conducted under the provisions of this chapter, and, except as herein modified, shall be held and conducted in the same manner and form, and under the same requirements, and subject to

the same forfeitures, penalties and punishments, as are now or shall hereafter be provided by law for the holding of regular state elections, but nothing herein contained shall make it obligatory upon any political party or parties to hold a primary election.

Sec. 340. Date of elections.—If any primary elections are held at the expense of the state or counties, except special primary elections, they shall be held on the first Tuesday in May, 1940, and on the first Tuesday in May every two years thereafter, and, when necessary, as hereinafter provided, a second primary shall be held in the fourth Tuesday next thereafter following said primary election. The second primary election shall be held by the same election officers, who held the first primary election, and be held at the same places the first primary election was held. No primary shall be held by any political parties for the nomination of candidates except as herein provided. Primary elections herein provided for shall be held at the regular polling places established for the purpose of holding general elections.

Sec. 341. Committees.—There may be provided a committee of each party for the state and each political subdivision of the state, including counties and municipalities, said committees to be selected in such manner as may be provided for by the governing authority of each party, but if there shall not be elected or chosen any committee for any county or municipality, then all the powers which could be exercised by any such committee shall be vested in the state executive committee under such rules and regulations as the governing authority of the party may designate; provided, however, that should no committee be elected or chosen from any municipality in the state, then the executive committee of the county in which said municipality is located shall exercise the powers and perform the duties of the executive committee of such municipality. The state executive committee may provide for the selection of any such committee.

Sec. 344. Certification of names of candidates by chairman.—The chairman of the state executive committee of each party entering a primary election shall, not less than forty days prior to the date of holding the election, certify to the secretary of state the names of all candidates for nomination to federal, state, circuit, and district offices, the

state senate and house of representatives, and all other candidates, except candidates for county offices. The chairman of the county executive committee of each party entering the primary election shall, not less than forty days prior to the date of holding the election, certify to the probate judge the names of all candidates for nomination to county offices. The secretary of state shall, not less than thirty days prior to the date of holding the primary election, certify to the probate judge of every county in which the election is to be held the names of the candidates for nomination to federal, state, circuit, and district offices, the state senate and house of representatives, and all other candidates, except candidates for county offices. The probate judge of each county shall have the ballots prepared for the primary election. If a legally qualified candidate for nomination to an office is unopposed when the last date for certifying candidates has passed, his name shall not be printed on the ballots to be used in the primary election, and he shall be the nominee of the party with which he has qualified for the office. The probate judge shall have the ballots so printed that the names of the opposing candidates for any office to be voted for by the voters of more than one county shall, as far as practicable, alternate in position upon the ballots so that the name of each candidate shall occupy, with reference to the name of every other candidate for the same office, first position, second position, and every other position, if any, upon an equal number of ballots. When printed, the ballots shall be distributed impartially and without discrimination by the probate judge. (as amended)

Sec. 345. Candidate must be legally qualified to hold office.—The name of no candidate shall be printed upon any official ballot used at any primary election unless such person is legally qualified to hold the office for which he is a candidate, and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party.

Sec. 347. Who may vote in primary.—All persons who are qualified electors under the general laws of the State of Alabama, and who are also members of a political party entitled to participate in such primary election, shall be entitled to vote therein and shall receive the official primary

ballot of that political party, and no other; but every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein, or to otherwise participate in such political parties and primaries; and the qualifications of electors entitled to vote in such primary election shall not necessarily be the same as the qualifications for electors entitled to become candidates therein; provided, that nothing herein contained shall be so construed as to prohibit any state executive committee of a party from fixing assessments or such other qualifications, as it may deem necessary, for persons desiring to become candidates for nomination to offices at a primary election, but such assessments shall not exceed two per cent of one year's enrolument from all sources, of the office sought, and for an unremunerative or party county office it shall not exceed five dollars, or twenty-five dollars for an unremunerative or party office to be filled by the vote of a subdivision greater than one county, or one hundred dollars for an unremunerative or party office filled by the vote of the whole state.

Sec. 348. Filing declaration of candidacy.—Any person desiring to submit his name to the voters in a primary election shall, not later than March first, next preceeding the holding of such primary election, file his declaration of candidacy in the form prescribed by the governing body of the party with the chairman of the county executive committee if he be a candidate for a county office, and with the chairman of the state executive committee, if he be a candidate for any office except a county office, and in like manner, and not later than March first, next preceding the holding of such primary election, pay any assessments that may be required to be paid by him. (as amended)

Sec. 350. Official ballots and election stationery.—Separate official ballots and other election stationery and supplies for each political party shall be printed and furnished for use at each election district or precinct, and shall be of a different color for each of the political parties participating in such primary election. All ballots for the same political party shall be alike, except as herein otherwise provided, printed in plain type, and upon paper so

thick that the printing cannot be distinguished from the back. Across the top of the ballot shall be printed the words, "Official Primary Election Ballot." Beneath this heading shall be printed the year in which said election is held and the words "Democratic Party" or "Republican Party" or other proper party designation. Each group of candidates to be voted on shall be preceded by the designation of the office for which the candidates seek nomination, and in the proper place shall be printed the words, "Vote for one.", or "Vote for two", (or more) according to the number to be elected to such office at the ensuing election. At the bottom of the ballot and after the name of the last candidate shall be printed the following, viz.: "By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election." Should any voter scratch out, deface or in any way mutilate or change the pledge printed on the ballot, he shall not be considered or held to have repudiated or to have refused to take the pledge, but shall, conclusively, be presumed and held to have scratched out, defaced, or mutilated or changed same for the sole purpose of identifying his ballot; and accordingly such ballot shall be marked "Spoiled Ballot" and shall not be counted.

Sec. 354. Lists of voters and necessary election supplies to be furnished by judge of probate.—The judge of probate of each county is hereby required to furnish to the officers of said primary election a copy of the official list of voters of each district or precinct in his county, of the same kind and in the same manner as he is by law required to furnish such list to the officers at any general state election, and he shall furnish as many of said lists as there are parties participating in said primary. The probate judge shall also furnish all necessary election supplies, including stamped addressed envelopes in which to mail certificate of results and other papers herein required to be forwarded. The probate judge shall deliver such election supplies and lists to the sheriff of the county not less than three days before the day of the election, and it shall be the duty of the sheriff to deliver the same, together with ballot boxes to the officers of said election, at the place provided by law for holding said election, and not later than seven-thirty o'clock a.m. on said election day.

Sec. 374. Contests of nomination; by whom instituted; grounds.—The contests of nomination by a party for office other than a county office, may be instituted by any qualified elector of the state, or of the political subdivision as the case may be, who belongs to that party and who legally participated in such primary election, upon the following grounds, which may be used separately, or else be joined in the same contest, namely: 1. Malconduct, fraud, or corruption on the part of any inspector, clerk, marker, returning officer, board of supervision or canvasser, or other persons. 2. When a person whose nomination is contested was not eligible to the office sought at the time of the declaration of nomination. 3. On account of illegal votes given. 4. On account of the rejection of legal votes. 5. Offers to bribe, bribery, intimidation, or other malconduct or misconduct calculated to prevent a fair, free and full exercise of the elective franchise. 6. Miscalculation, mistake or misconduct in counting, tallying, certifying or canvassing which of itself alone or in conjunction with the giving of illegal votes or the rejection of legal votes, or any other ground would, when everything is corrected, reduce the number of legal votes cast for the declared nominee down to or below those of some other candidate in that race.

Section 384. Elector who has participated may contest election; procedure.—Any qualified elector of a party, participating in any primary election held under the provisions of this chapter may if he participated in the primary, contest a nomination declared by his party to any office, other than a county office, by filing with the chairman of the state executive committee his statement of contest and grounds thereof as required by this chapter, for contest before a committee, verified and with averments the same as therein provided, and by giving security as elsewhere provided in this chapter. The person whose nomination is contested shall at once be notified by such chairman, in writing, of such fact and such contestee shall have ten days after the receipt of such notice of such contest within which to file with the chairman of the state executive committee his objections and answers to the statement of contest.

Sec. 386. Meeting of state executive committee in case of contest.—The state executive committee shall, upon the filing of a contest with the chairman, be called by such chairman, to meet at a time not less than ten days nor more than twenty days from the time of filing such contest, for

the purpose of hearing and determining the same, or, without calling the committee to meet, the chairman may appoint a sub-committee as herein provided for.

Sec. 388. New primary in case contest cannot be decided.—If, upon the hearing of any contest for any office, as provided for in this chapter, the committee, after an investigation and hearing of the contest, shall determine that it is impossible from the evidence before it to decide who is the legally nominated candidate for the office contested, it shall have the right and authority to direct a new primary election for the nomination to any such office, but where any action is taken by any county executive committee, either person to the contest, in the same manner as herein provided for in the case of appeals from the action of any county committee, may take an appeal to the state executive committee, which shall be the court of final appeal in all party contests of nominations; provided, that upon hearing of any contest or appeal, as provided for in this chapter, which is not referred to and decided by a sub-committee fifteen members of any such state executive committee shall constitute a quorum for the hearing and determining of such contest, or appeal, provided further, that the entire committee be notified of the meeting in the usual way.

Sec. 389. Power of state committee to provide rules of party procedure.—The state executive committee may prescribe such other additional rules governing contests and other matters of party procedure as it may deem necessary, not in conflict with the provisions of this chapter.

APPENDIX "B."

Item One: Resolution of Jan. 26, 1952.

The following Resolution was adopted by the State Democratic Executive Committee of Alabama at its meeting in Montgomery, Alabama, on Saturday, January 26th, 1952:

Montgomery, Alabama
January 26, 1952

BE IT RESOLVED BY THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA AS FOLLOWS:

1. That under the authority, and subject to the terms and provisions of, the Primary Election Law of Alabama as contained in Sections 336 to 424, both inclusive, of Title 17 of the Code of Alabama of 1940, and the amendments thereto, a Democratic Primary Election is hereby ordered to be held throughout the State of Alabama on Tuesday, May 6th, 1952, and, if necessary, as provided by said law, a second Democratic Primary Election is hereby ordered to be held throughout the State of Alabama on Tuesday, June 3rd, 1952.

2. That said Primary Election shall be held and conducted in all respects in accordance with the Primary Election Law of Alabama as hereinabove referred to.

3. (A) That in said Primary Elections there shall be nominated candidates for all Federal, State, District, Circuit, County and Precinct offices to be filled in the General Election to be held in November, 1952; and there shall be nominated in said Primary Elections eleven Electors for President and Vice-President of the United States from and by the State at Large and eleven Alternate Electors from and by the State at Large.

(B) That there shall be elected in said Primaries a Democratic National Committeeman and a Democratic National Committeewoman from the State of Alabama; and in said Primary Elections there shall also be elected twenty-six Delegates and twenty-six Alternate Delegates to the Democratic National Convention which shall be held in 1952, eight of said Delegates and eight of said Alternate Delegates to be elected from and by the State at Large, and two of said Delegates and two of said Alternate Delegates to be

elected from and by each of the nine Congressional Districts in this State. Of the eight Alternate Delegates elected from the State at Large the one receiving the highest number of votes in said Primary Election shall be designated as Alternate Delegate from the State at Large No. 1, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 2, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 3, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 4, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 5, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 6, the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 7, and the one receiving the next highest vote therein as Alternate Delegate from the State at Large No. 8, and in the same order such Alternates shall fill vacancies as the same may occur in the delegation from the State at Large. Also, as to the two Alternates elected from each Congressional District as herein provided, the one receiving the highest number of votes in said Primary Election shall be designated District Alternate Delegate No. 1 from said District and the one receiving the next highest vote therein shall be designated as District Alternate Delegate No. 2 from said District, and shall in the same order fill vacancies as the same may occur in the delegation from the respective Districts. Should there be any vacancy from any cause in the Alabama Delegation in the Democratic National Convention of 1952, and an Alternate Delegate is not present to fill such vacancy, then the remaining members of the Alabama Delegation to said Democratic National Convention shall by majority vote fill any and all such vacancies on the said Alabama Delegation.

4. That the following persons shall be entitled to vote in said Primary Elections, and none others, namely: Qualified electors in this State who believe in the principles of the Democratic Party, and who agree and bind themselves by participating in said Primary, to abide by the result of said Primary Elections and to aid and support the nominees of the Democratic Party therein and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, and that there shall be printed in plainly visible type at the bottom of each

ballot prepared for said Primary Elections, and on the face of each voting machine used therein the following, to wit:

"By casting this ballot I do pledge myself to abide by the result of this Primary Election and to aid and support all the nominees thereof in the ensuing General Elections. I do further pledge myself to aid and support the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States."

5. That the following persons, and none others, shall be eligible to be candidates for nomination or election in said Primary Elections, namely: Qualified electors who possess the qualifications fixed by law for the respective offices for which they are candidates for nomination or election; provided, however, that no person shall become a candidate for any Federal, State, District, Circuit, County, Precinct or Party Office, or have his or her name printed upon the Democratic ballot in said Primary Elections, if such person voted a Republican ticket or any independent ticket, or the ticket of any party or group other than the Democratic Party, or for anyone other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket in the General Election held in November, 1950, or openly and publicly opposed the election of the nominees of the Democratic Party, or any of them, in the General Election held in November, 1950; and provided further that each such proposed candidate shall have filed with the Chairman of the State or County Democratic Executive Committee as provided in Paragraph 6 of this Resolution a declaration of candidacy signed and sworn to by such proposed candidate containing a pledge to aid and support all of the Democratic nominees in said elections and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States, and provided further that no person shall become a candidate for the Democratic nomination for Judge of a Court of Record who is under disbarment or suspension at the time he seeks to qualify for such office. Each such proposed candidate shall also be required to pay, as hereinafter provided, the assessment, or entrance fee, fixed, or levied, by this Committee, or fixed or levied by his County Democratic Executive Committee, if he be a candidate for nomination for a

County Office, ON OR BEFORE the first day of March, 1952.

6. That candidates for nomination or for election for all of said offices shall, ON OR BEFORE March 1, 1952, file with the Chairman of the State Democratic Executive Committee in all offices except County offices, and for County offices, with the Chairman of the respective County Democratic Executive Committees, a declaration of candidacy as follows:

"I hereby declare myself to be a candidate for the Democratic nomination (or election) in the primary elections to be held on Tuesday, the 6th of May, 1952, and on Tuesday, the 3rd of June, 1952, for the office of ..... I hereby certify that I did not vote, in the general election held in November, 1950, a Republican ticket or any independent ticket, or the ticket of any party or group, other than the Democratic Party, or for any one other than the nominees of the Democratic Party, or any ticket other than the Democratic ticket, or openly and publicly in said general election oppose the election of the nominees of the Democratic Party, or any of them. I further agree to abide by the result of the primary elecfions in which I am a candidate and I do pledge myself to aid and support all the nominees in said Primary Elections, and also the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States. I further certify that I am a qualified elector of the State of Alabama and possess the qualifications fixed by law for the office for which I am a candidate. and if a candidate for the Democratic nomination for Judge of a Court of Record. I do further certify that at the tme of filing this declaration of candidacy, I am not under disbarment or suspension.

Sworn to and snbscribed before
me on this the ..... day of ....., 1952.

.....

Notary Public ..... County, Alabama."

7. That in accordance with Section 346 of Title 17 of the Code of Alabama of 1940, hereinabove referred to, this Committee, desiring to enter the Primary Elections ordered to be held under the provisions of said Primary Law, shall give public notice thereof by filing, in accordance with said Section of our Code, a copy of this Resolution with the Secretary of State of Alabama, and the Chairman of this Committee is authorized and directed to prepare, execute and file said copy.

8. That the following entrance or qualifying assessment against each candidate for nomination, or election, in such Primary Elections, except as to County offices, be, and the same hereby are, fixed, or levied, by this Committee.

(1) Against each candidate for nomination for any remunerative office, other than a County office, two per cent of the emolument of such office for one year, from every lawful source (not including allowance to Circuit Judges and Circuit Solicitors for expenses and allowances to Congressmen and United States Senators for expenses), except that in the case of candidates for Circuit Judge for the unexpired term of their predecessor, the entrance or qualifying assessment shall be $35.00;

(2) Against each candidate for Elector for President and Vice-President of the United States, and against each Alternate candidate for Elector, $10.00;

(3) Against each candidate for Democratic National Committeeman, $50.00;

(4) Against each candidate for Democratic National Committeewoman, $50.00;

(5) Against each candidate for Delegate to the Democratic National Convention from the State at Large, $50.00, and against each candidate for Alternate Delegate to the Democratic National Convention from the State at Large, $25.00;

(6) Against each candidate for Delegate to the Democratic National Convention from a Congressional District, $10.00, and against each candidate for Alternate Delegate to the Democratic National Convention from a Congressional District, $5.00.

9. That no candidate for nomination for any office or for election to any party office other than a County office, who fails to pay the assessment required to be paid by him ON OR BEFORE March 1st, 1952, or who fails to file his affidavit in the form herein prescribed ON OR BEFORE the 1st day of March, 1952, to and with the Chairman of the State Democratic Executive Committee, shall have his name printed on the tick (sic), nor shall votes for such candidate so failing to qualify be counted.

10. That, within the limits provided by law, the authority of this Committee to fix entrance or qualifying fees or assessments of candidates for Democratic nomination for County office, is hereby vested in the several Democratic County Executive Committees of this State, insofar as the 1952 Democratic Primary Elections are concerned.

11. That no candidate for nomination for a County office who fails to pay the assessment required to be paid by him ON OR BEFORE March 1st, 1952, or who fails to file his affidavit in the form herein prescribed ON OR BEFORE the 1st day of March, 1952, to and with the Chairman of the County Democratic Executive Committee, shall have his name printed on the ticket, nor shall votes for such candidate so failing to qualify be counted.

12. That the Chairman of this Committee be, and he hereby is authorized, empowered, and directed, to appoint a Sub-Committee of five, consisting of the Chairman of this Committee, who will be the Chairman of the Sub-Committee, and four members of this Committee, and such Sub-Committee shall have all the powers of this Committee to supervise the holding of the Primary Elections herein ordered, including the canvassing and tabulating of the vote and the declaration of result and the certification of those nominated, and/or elected, and the said Sub-Committee shall perform all the duties required by law of this Committee in said Primary Elections, except the duties reposed by law on the Chairman.

13. That no County Democratic Executive Committee of any County of the State shall pass any resolution or take any action in the premises in conflict herewith.

14. That a copy of this resolution be sent by the Chairman of this Committee to the Chairman of each County

Democratic Executive Committee of the State for their guidance and compliance.

15. That if, in the opinion of the Chairman of this Committee, it becomes necessary or advisable for any further action to be taken in connection with such Primaries or the details pertaining thereto, the Chairman of this Committee is hereby fully authorized and empowered to act for and on behalf of the Committee.

16. If any sentence, clause, term, provision, or part of this resolution should be held invalid or ineffective by any Court or officer such holding shall not invalidate or affect the remainder of this resolution.

STATE OF ALABAMA
JEFFERSON COUNTY

I, Ben F. Ray, Chairman of the State Democratic Executive Committee of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the resolution adopted by the State Democratic Executive Committee of Alabama, at its meeting held in Montgomery, Alabama, on January 26th, 1952, and I do hereby file this certified copy of the said resolution with Mrs. Agnes Baggett, Secretary of State of Alabama, in all respects as provided by Section 346 of Title 17 of the Code of Alabama of 1940.

Given under my hand and the seal of the said State Democratic Executive Committee of Alabama, at Birmingham, Alabama, on this the 26th day of January, 1952.

BEN F. RAY,
Chairman of the State Democratic
Executive Committee of Alabama.

Item Two: Rules of the Democratic Party of Alabama.

The following rules are ordained and established by the State Democratic Executive Committee of Alabama:

1. This Committee shall be known as the State Democratic Executive Committee of Alabama and may be called the State Committee.

2. This Committee shall be composed of seventy-two members, eight from each congressional district, chosen by plurality vote by the plan in force at the time of the elec-

tion. The member receiving the highest vote in his district shall be the member for the State at large from that district. Should there be a tie vote for the highest place and/or should all the members receive the same vote, then the Committee shall elect one member therefrom as a member from the state at large. Each must be a qualified elector, and shall have and retain his citizenship and right to vote in the district from which he is chosen, and should he lose his citizenship by permanently removing from said district, then this shall constitute a vacancy in such membership. Vacancy in membership from any cause will be filled for the unexpired term by the State committee at the next meeting following the vacancy. The term of membership begins on the first Monday after the second Tuesday in January next after the election and is for four years from the time of their installation in office and until their successors are elected and qualified.

3. The state committee shall meet at such time and place as the committee may determine, or a majority thereof, or upon the call of the chairman.

4. The State Democratic Executive Committee of Alabama shall review, on appeal, the decision of the county committees in all cases concerning the nomination of county officers and all matters relating to rules and policies. The State committee has supervisory power over county committees and is authorized of its own motion to set aside any action of a county committee which it may deem proper.

5. The officers of this committee are: (a) Chairman; (b) Vice-Chairman; (c) Secretary; (d) Treasurer; and a Chairman pro tem. may be chosen for a full meeting or any part thereof. A Secretary pro tem. may be appointed by the Chairman as occasion may require. The Treasurer shall be appointed by the Chairman and the Treasurer and Secretary need not be members. The offices of Secretary and Treasurer, when deemed advisable, may be filled by the same person, but the Treasurer may be a banking institution. The Secretary and Treasurer shall at all times be under the direction of the Chairman, and shall report and serve as required by him, and all appointees of the Chairman hold at his pleasure.

The Chairman is authorized to appoint a stenographer or reporter to take the minutes of the meetings; also, any other agents or assistants as may be necessary.

The Chairman of this committee is authorized and empowered to reject declarations of candidacy, with or without a trial before the committee, notwithstanding the affidavit, if he believes the affidavit to be untrue, with a right of appeal on the part of the candidate to the Executive Committee for review.

6. Unless otherwise provided for in these rules, the rules as to parliamentary procedure governing the House of Representatives of this State shall be of force and govern in all meetings of this committee or any sub-committee or committees thereof.

7. The order of business shall be as follows: 1. Assembly and roll-call. 2. Minutes, unless dispensed with. 3. New business, in the call or otherwise. 4. Unfinished business, old or new. 5. Vacancies in membership filled. 6. Adjournment.

The order of business may be changed at any time by the Chairman, in absence of objection.

The State Chairman votes, and if a tie occurs the proposition is lost.

In emergencies the Chairman, at his discretion, may take a vote of the membership by mail or referendum on any matter, except as otherwise provided by law or the rules of this Committee, he fixing the time to vote, but a vote so taken shall not be opened or cast at a meeting.

Proxies are never allowed.

Suspension of rules may be had by two-thirds concurring vote of those voting, provided at least a quorum votes, but shall not be had by referendum or mail.

Order of procedure of motions and the like shall be as follows: 1. Adjourn. 2. Adjourn to fix time. 3. Referring to Committees. 4. Postpone indefinitely. 5. Previous question. 6. Lay on the table. 7. Postpone to fixed time. 8. Amend.

8. At all meetings of the Committee, a majority vote shall prevail except upon motion to change or suspend the rules established for the government of this committee.

9. Seventeen members, or such number of members as may be required by law of the committee shall constitute a quorum.

10. There shall be an executive committee, composed of one member from each Congressional district, to be appointed by the Chairman of the State Committee, subject to the approval of the committee. It shall be their duty to execute and carry out the plans of the State Committee as the same shall, from time to time, be laid down by that committee, under whose authority it shall act. The Chairman of this committee shall be an ex-officio member and Chairman of the said executive committee. Five members shall constitute a quorum.

11. A finance committee of not over seven members, consisting of the State Chairman and not less than two nor more than six others, any three of whom may act by majority, may be named, changed, discharged, wholly or in part, from time to time, as deemed best, by the Chairman, for the purpose and with the power of aiding him in auditing and determining, and allowing or rejecting claims and in expending funds, or in other financial matters, as desired by him from time to time, and to be known by such name as he may desire.

12. The State Committee, except as otherwise provided by law has sovereign, original, appellate, and supervisory power and jurisdiction of all party matters throughout the state, and each county thereof. It is empowered and authorized to prescribe and enforce rules, regulations, and penalties against the violation of party fealty including removing or debarring from party office or party privilege anyone within its jurisdiction, including a member of this committee, who violates such fealty or its rules, or its other lawful mandate.

13. Only those candidates who have qualified as required by law and who have also complied with the rules and regulations fixed by this committee shall be voted for in any primary election. It shall not be permissible to write or stamp in any name not officially printed on the primary ballot in any primary election, except the names of beat committeemen may be so written or stamped.

14. The chairman of this committee is hereby authorized and empowered to create any special or sub-committee as may be desired.

15. The term of office of members of the county committee shall begin on the first Monday after the Second Tuesday in January next after their election, and shall continue for four years, and until their successors are elected and qualified.

16. Funds of the Committee shall be kept on deposit in bank in the Committee's name, or the name of the sub-committee, as the case may be. The State Chairman may place funds to the bank credit of the sub-committee from time to time as convenience may suggest. Funds shall be disbursed by bank draft or check drawn by the Treasurer and countersigned by the Chairman, or, when more convenient, drawn by the Chairman, of either, against funds to its credit.

Assessment payments by candidates shall be required as per statutes, and if statutes should not expressly permit, then only by way of request.

Assessments are fixed by the State Committee, or its sub-committee duly authorized, as to all offices filled by the vote of territory greater than a single county, and by county executive committees as to all offices filled by the vote of a single county or less territory, except congressmen from a district of only one county as to which the State Committee shall fix the assessment.

Obligations of this Committee or its sub-committee, may be paid by the State Chairman or sub-chairman, as the case may be, out of committee funds, without waiting for a meeting of the State Committee.

17. Sub-committees may incur the reasonable and necessary expenses of carrying out their purposes and shall report the receipts, disbursements, and expenses. The actual and necessary expense of a member of a sub-committee incurred by him for traveling within the State, or in the necessary discharge of his duty as such committeemen, may be paid out of the State Committee's general funds, but shall not be taxed as any part of the costs of a contest or appeal on contest.

The State Chairman's expenses whether for postage, stationery, long or short distance telephone or telegraph mes-

sages, freight, express, parcel post, railroad or other transportation, office help, or other expense incurred in attending meetings of any of the sub-committees of the State Committee as requisite, or otherwise incurred in the discharge of the duties of his office except attending meetings of the State Committee, shall be paid or reimbursed from the Committee's general funds.

Accounts of officers, sub-committees, agents, should be audited from time to time, especially at the ends of campaigns, and the Chairman may appoint a committee therefor at any time of not over three members, in his discretion.

18. State office includes any that is state-wide or filled by the vote of the whole State, and any office of which the whole or greater part of the emolument is paid by the State. State Executive Committeeman is a party officer.

A district, circuit, or division office is one filled by the vote of a district, division, or circuit.

And a county office includes any other office than the above stated, that may be filled by the vote of a single county or less territory.

19. (A) Whenever a special election is called to fill a State office, or the office of representative in congress, except the offices of State Senator and Representative, the State Committee may in its discretion, nominate a candidate of the party therefor, or provide for a nomination by primary election, or convention, or other method in vogue in the Party at the time. Where there is ample time for using the customary method primary, or convention, etc., then that should be used. But the Committee determines as to the emergency or circumstances.

(B) When the special election is for the office of State Senator in a district embracing more than one county the State Chairman in conjunction with the members of the State Committee residing in the territory affected, or a majority of them, present at a meeting called by the State Chairman, for that purpose may nominate a candidate of the party therefor.

(C) When the special election is for any county office, or for representative, or state senator in a district of only one county, the county executive committee may act, in the same way, and with like power and duty, regarding such office, as first above provided for the State Committee.

(D) Certificates of nomination shall be promptly made by the same presiding officer or other officers as in cases of nominations at primary elections or conventions.

(E) When a nomination has been made and becomes vacant before the election, the vacancy may be filled by use of any of the above stated plans for making nominations for special elections that may be applicable or adaptable to use, in the judgment of the State Chairman who shall advise or direct action as occasion may suggest or require.

But a vacant nomination for a circuit judgeship filled by the vote of a single county shall be filled by the State Committee under subdivision (A) above.

The nomination filled shall be certified as requisite for the original nomination.

20. These rules may be amended, altered, or repealed, after written notice, showing what change is proposed, furnished the members of the committee ten days before any regular or called meeting of the State Committee. If the change be proposed at a meeting, it shall lie over at least twelve hours.

Such amendment or alteration, or repeal shall be adopted or carried by a vote of a majority of the members voting, if a quorium votes, and if taken on referendum or by mail, it shall require a concurring majority of all members of the State Committee to effect the change or amendment.

21. The State Committee may make any rules or regulations for the purpose of enforcing these rules not inconsistent therewith.

APPENDIX "C"

RELEVANT STATUTES IN THOSE STATES WHICH PROVIDE THAT THE NAMES OF CANDIDATES FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES SHALL APPEAR ON GENERAL ELECTION BALLOTS IN LIEU OF THE NAMES OF CANDIDATES FOR PRESIDENTIAL AND VICE-PRESIDENTIAL ELECTORS.

CALIFORNIA

Deering's California Code, Elections:

§ 3003. Presidential Candidates and Electors. Whenever a group of candidates for presidential electors equal in number to the number of presidential electors to which this State is entitled filed a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

§ 10555. Convening and Voting for President and Vice-President: Party Vote. The electors, when convened, if both candidates are alive, shall vote by ballot for that person for President and that person for Vice President of the United States, who are, respectively, the candidates of the political party which they represent, one of whom, at least, is not an inhabitant of this State.

COLORADO

1935 Colorado Statutes Annotated, Chapter 59:

§ 197. (As amended) Form of ballot.—Every ballot, intended for the use of voters, shall contain the names of all candidates for offices to be balloted for at that election, whose nominations have been duly made and accepted as herein provided, and who have not died or withdrawn, and shall contain no other names of persons except that when presidential electors are to be elected, their names shall not be printed upon the ballot, but in lieu thereof, the names of the candidates of their respective parties or political groups for president and vice-president of the United States shall be printed together in pairs under the title "presidential

electors." Such pairs shall be arranged in alphabetical order of the names of the candidates for president in the manner provided for in section 198 of this chapter. A vote for any such pair of candidates shall be a vote for the electors of the party or political group by which such candidates were named and whose names have been filed with the secretary of state. . . .

CONNECTICUT.

Connecticut General Statutes (1949 Revision):

§ 1043. Vote for presidential electors. When an election is to be held for the choice of electors of president and vice-president of the United States, if any political party shall have nominated candidates for president and vice-president of the United States, and electors to vote for such presidential and vice-presidential candidates shall have been nominated by a political convention of such party in this state, or in such other manner as shall entitle the names of such electors to be placed upon the ballots or voting machines to be used in such election, it shall be lawful for the secretary and for every other official charged with the preparation of ballots or voting machines to be used in such election, in lieu of placing the names of such electors of president or vice-president on such ballot or voting machine, to place on such ballots or voting machines a space with the words "Presidential electors for (here insert the last name of the candidate for president, the word 'and' and the last name of the candidate for vice-president)"; and a vote cast by making a crossmark to the left of such space, or by registering a vote in such space in the manner required by the voting machine, shall be counted, and shall be in all respects effective, as a vote for each of the presidential electors representing such candidates for president and vice-president.

DELAWARE

Laws of Delaware 1943, Chapter 119, page 403:

Section 1. . . . There shall be two separate ballots, to-wit: a Presidential and Vice-Presidential Ballot and a State, County and District Ballot. The Clerks of the Peace for the several Counties shall cause to be printed on the Presidential and Vice-Presidential Ballot, herein provided for,

the names of the candidates nominated for President and Vice-President by the parties recognized by them as political parties within the meaning of this Chapter, as shall be certified to them by the Secretary of State; . . .

On the sample ballot set out in Section 3 of the above Act appears the following statement:

"A vote for the candidates for President and Vice-President shall be a vote for the electors of such party, the names of whom are on file with the Secretary of State."

ILLINOIS

Illinois Revised Statutes 1951, Chapter 46:

§ 21-1. . . . (b) The names of the candidates of the several political parties or groups for electors of President and Vice-President shall not be printed on the official ballot to be voted in the election to be held on the day in this Act above named. In lieu of the names of the candidates for such electors of President and Vice-President, immediately under the appellation of party name of a party or group in the column of its candidates on the official ballot, to be voted at said election first above named in section 2-1, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice-President of such party or group with a square to the left of such bracket. Each voter in this State from the several lists or sets of electors so chosen and selected by the said respective political parties or groups, may choose and elect one of such lists or sets of electors by placing a cross in the square to the left of the bracket aforesaid of one of such parties or groups. Placing a cross within the square before the bracket enclosing the names of President and Vice-President shall not be deemed and taken as a direct vote for such candidates for President and Vice-President, or either of them, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided. Voting by means of placing a cross in the appropriate place preceding the appellation or title of the particular political party or group, shall not be deemed or taken as a direct vote for the candidates for President and Vice-President, or either of them, but instead to the Presidential vote, as a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided. . . .

INDIANA

Burns Indiana Statutes Annotated:

§ 29-3902. Names on ballots—Form.—The names of the candidates for electors of president and vice-president of the United States, of any political party or group of petitioners, shall not be placed on the ballot, but in arranging and preparing the ballots for the election at which presidential electors are to be elected, the names of the candidates for president and vice-president of the United States, respectively, of such political parties or groups of petitioners, shall be placed in one (1) column on the ballot, where ballots are used, and on one (1) ballot label, in one (1) column or row, where voting machines are used in the same form and manner as the names are set out in section 120 (§.29-3903), under the title and device of such political party or group of petitioners, nominating a group of candidates for presidential electors. Wherever the names of the candidates for president and vice-president of the United States, respectively, are so printed, there shall be printed above their respective names the words: "For presidential electors for."

§ 29-3904. Votes cast for president and vice-president construed as votes for electors—Counting, canvassing and certifying of votes.—Every vote cast or registered for the candidates for president and vice-president of any one political party or group of petitioners shall be conclusively deemed to be a vote cast or registered for all of the candidates of such political party or group of petitioners for the presidential electors of such party or groups of petitioners, and shall be counted as such. The votes cast or registered for the candidates for president and vice-president of any political party or group of petitioners shall be counted, canvassed and certified in the same manner, and subject to the same penalties and liabilities, as the votes for other candidates.

IOWA

Code of Iowa 1950:

Ch 49, § 49.32 Candidates for president in place of electors. The candidates for electors of president and vice-president of any political party or group of petitioners shall not be placed on the ballot, but in the years in which

they are to be elected the names of candidates for president and vice-president, respectively, of such parties or group of petitioners shall be placed on the ballots, as the names of candidates for United States senators are placed thereon, under their respective party, petition, or adopted titles for each political party, or group of petitioners, nominating a set of candidates for electors.

Ch 54, § 54.2 How elected: A vote for the candidates of any political party, or group of petitioners, for president and vice-president of the United States, shall be conclusively deemed to be a vote for each candidate nominated in each district and in the state at large by said party, or group of petitioners, for presidential electors and shall be so counted and recorded for such electors.

KENTUCKY

Kentucky Revised Statutes 1948:

§ 118.070 Persons entitled to have name placed on ballot for regular election. (1) . . . the county clerk of each county shall cause to be printed on the ballots for the regular election the names of the following persons: . . . .

(f) Candidates for President and Vice President of the United States, of those political parties and organizations who have nominated presidential electors as provided in KRS 118.090, where the certificate of nomination of such electors has been filed with the Secretary of State within the time prescribed in KRS 118.130.

§ 118.170 Form of ballot; party emblems; method of indicating public questions. . . .

(6) The names of candidates of the several political parties and organizations for electors of President and Vice President of the United States shall not be printed on the ballot, but in lieu thereof, immediately under the party name or device of each party in the column of its candidates on the official ballot, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice President of such party, with a square to the right of the bracket. The placing of a cross within the square to the right of the bracket enclosing the names of candidates for President and Vice President, or in the circle at the head of the column of such party, shall not be

deemed and taken as a direct vote for such candidates for President and Vice President, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party as provided in KRS 118.090.

MARYLAND

Annotated Code of Maryland, Article 33:

§99. The form and arrangement of the ballots shall be as follows: All ballots shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified to and filed according to the provisions of this Article, and not withdrawn in accordance therewith, except that the names of the candidates for the office of Electors of President and Vice-President of the United States shall not be printed on the ballot but in lieu thereof the names of the candidates of each political party for the office of President and Vice-President shall be printed thereon. . . . There shall be left at the right of the surnames of the candidates for President and Vice-President, so formed as to include both names, a sufficient clear square in which each voter may designate by a cross (X) his choice for electors, and a cross (X) placed by the voter in the square opposite the names of the candidates of a party for President and Vice-President shall be deemed and counted as a vote for each of the Presidential Electors of said party named in the certificate of nomination filed according to the provisions of this Article. . . .

§197. On the day fixed by law of the United States for choice of President and Vice-President of the United States there shall be elected by general tickets as many electors of President and Vice-President as this State shall be entitled to appoint; provided that the names of the candidates for the office of electors of President and Vice-President of the United States shall not be printed on the ballot but in lieu thereof the names of the candidates of each political party for the office of President and Vice-President shall be printed thereon; and a vote for said candidates for President and Vice-President shall be deemed and counted as a vote for each of the Presidential electors of said party named in the certificate of nomination of such Presidential candidates filed according to the provisions of this Article.

MASSACHUSETTS

Annotated Laws of Massachusetts, Chapter 54:

§43. Presidential Electors, Arrangement of Names of Candidates, etc.—The names of the candidates for presidentil electors shall not be printed on the ballot, but in lieu thereof the surnames of the candidates of each party for president and vice president shall be printed thereon in the line under the designation "Electors of president and vice president" and arranged in the alphabetical order of the surnames of the candidates for president, with the political designation of the party placed at the right of and in the same line with the surnames. A sufficient square in which each voter may designate by a cross (X) his choice for electors shall be left at the right of each political designation.

MICHIGAN

Compiled Laws of Michigan 1948:

§ 177.16. . . . At the general November election in the year in which electors of president and vice-president of the United States are elected, a separate ballot shall be printed, upon which shall be printed the names of the candidates for president and vice-president of the United States in the manner provided in section 20 of this chapter.

§ 190.4 Ballot; marking, effect of cross in circle.

Sec. 4. Marking a cross in the circle under the party name of a political party, at the general November election in a presidential year, shall not be deemed and taken as a direct vote for the candidates of the said political party for president and vice-president or either of them, but, as to the presidential vote, as a vote for the entire list or set of presidential electors chosen by that political party and certified to the secretary of state as in this chapter provided.

MISSOURI

Revised Statutes of Missouri 1949:

§ 111.420. Form of ballot—sample.—1. Every ballot printed under the provisions of this chapter shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names.

The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. The names of the candidates of the several political parties for electors of president and vice-president shall not be printed on the ballot, but shall after nomination, be filed with the secretary of state.

2. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. The respective party state committees shall certify in writing the nominations of such presidential and vice-presidential candidates to the secretary of state at some time before the secretary of state is required by law to certify the candidates of the several political parties and groups of petitioners to the several clerks of the county court or to election commissioners. In presidential years an instruction shall be on the ballot as follows: "A vote for names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state."

NEBRASKA

Revised Statutes of Nebraska, 1943:

§ 32-219. Presidential electors; how chosen. In the year 1944 and every four years thereafter, at the general election held on such day as Congress may appoint, each presidential elector nominated by any party or group of petitioners shall receive the combined vote of the electors of the state for the candidates for President and Vice President of such party or group of petitioners, and a vote cast for the candidates for President of the United States shall be a vote for the electors of the respective party or group of petitioners.

§32-503. Ballots; form. . . . (3) if the election be in a year in which a President of the United States is to be elected, in spaces separated from the foregoing by a heavy black line and entitled "Presidential Ticket," in black type not less than eighteen point, shall be the names and spaces for voting for candidates for President and Vice President; the names of candidates for President and Vice President for each political party shall be grouped together, each group enclosed with brackets with one square to the left in which the voter indicates his choice, and the party name to the right according as near as possible to the following form or schedule:

( ) JOHN DOE, President
RICHARD ROE, Vice President
Republican

with a heavy line across the column, separating the group of the different political parties; no blank lines are to be left for writing in names for President and Vice President; . . .

NEW HAMPSHIRE

Public Laws of New Hampshire, 1943, page 13, approved February 9, 1943:

§ 1. Biennial Election Ballots. Amend section 3 of chapter 34 of the Revised Laws by striking out all of said section and inserting in place thereof the following new section: 3. Contents. Every ballot shall contain the name and residence of each candidate who has been nominated in accordance with law, except as hereinafter provided, and shall contain no other name except party appellations. The names and addresses of the presidential electors shall not be printed on the ballot, but in lieu thereof the names of a party's candidates for president and vice-president shall be printed thereon under the designation "Electors of president and vice-president of the United States." In case a nomination is made by nomination papers, the words, Nom. Papers, shall be added to the party appellation.

NEW JERSEY

Revised Statutes Cumulative Supplement of New Jersey, Title 19:

§ 19:14-11. Arrangement of nominees for electors of president and vice-president; directions to voters. The sur-

names of candidates for president and vice-president of the United States shall be printed in one line preceded by the words "presidential electors for." In the nomination by petition columns the surnames of candidates for president and vice-president shall be followed by the designation mentioned in the petitions filed. In the personal choice column the voter may write or paste the surnames of candidates for president and vice-president for whom he desires the electors to vote. To the left of the surnames of candidates for president and vice-president of the United States, shall be printed a square, one-half inch in size, accompanied by the following directions to the voter: "To vote for all the electors of president and vice-president mark a cross or plus within the square opposite the surname of president and vice-president."

§ 19:14-4. Head of the ballot; form and contents; instructions. . . .

7. To vote for all the electors of any party, mark a cross or plus in black ink or black pencil in the square at the left of the surnames of the candidates for president and vice-president for whom you desire to vote.

NORTH CAROLINA

General Statutes of North Carolina of 1943:

§163-108. Arrangement of names of presidential electors.—The names of candidates for electors of president and vice-president of any political party or group of petitioners, shall not be placed on the ballot, but shall after nomination be filed with the secretary of state. In place of their names there shall be printed first on the ballot the names of the candidates for president and vice-president, respectively, of each party or group of petitioners and they shall be arranged under the title of the office. A vote for such candidates shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state.

NEW YORK

See p. 56, infra.

OREGON

See text of brief on the merits, p. 15.

PENNSYLVANIA

Purdon's Pennsylvania Statutes Annotated, Title 25:

§ 2878. Presidential electors; selection by nominees; certification; vacancies.

The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to. If for any reason the nominee of any political party for President of the United States fails or is unable to make the said nominations within the time herein provided, then the nominee for such party for the office of Vice-President of the United States shall, as soon as may be possible after the expiration of thirty days, make the nominations. The names of such nominees, with their residences and post-office addresses, shall be certified immediately to the Secretary of the Commonwealth by the nominee for the office of President or Vice-President, as the case may be, making the nominations. Vacancies existing after the date of nomination of presidential electors shall be filled by the nominee for the office of President or Vice-President making the original nomination. Nominations made to fill vacancies shall be certified to the Secretary of the Commonwealth in the manner herein provided for in the case of original nominations.

In the official ballot form prescribed by Section 2963 of Title 25, supra, the following instruction appears:

"To vote for a person whose name is not on the ballot, write or paste his name in the blank space provided for that purpose. A cross mark in the square opposite the names of the candidates of any party for President and Vice-President of the United States indicates a vote for all the candidates of that party for presidential elector. To vote for individual candidates for presidential elector, write or paste their names in the blank spaces provided for that purpose under the title 'Presidential Electors.'"

RHODE ISLAND

Public Laws of Rhode Island, 1939-1940, page 739, chapter 818, provides for the use of voting machines in general elections. Section 1 of this Act provides in part as follows:

"Sec. 3. Any type or make of voting-machine approved by the board of elections must meet the following requirements: . . .

"It may also be provided with one device for each party, for voting for all the presidential electors of that party by one operation, and a ballot therefor containing only the words 'Presidential electors for' preceded by the name of that party and followed by the names of the candidates thereof for the offices of president and vice president, and a registering device therefor which shall register the vote cast for said electors when thus voted collectively; *provided, however,* that means shall be furnished whereby the voter can cast a vote in part for the candidates for presidential electors of one party, and on part for those of one or more other parties or in part or in whole for persons not nominated by any party; . . .

WASHINGTON

Public Laws of Washington, 1935, page 45, chapter 20, approved February 23, 1935:

Section 1. In the years in which presidential elections are held each political party nominating candidates for president and vice-president of the United States and electors of the same shall file with the secretary of state certificates of nomination of such candidates at the time and in the manner and number provided by law. The secretary of state shall certify to the county auditors the names of the candidates for president and vice-president of the several political parties, which shall be printed on the ballot. The names of candidates for electors of president and vice-president shall not be printed upon the ballots. The votes cast for candidates for president and vice-president of each political party shall be counted for the candidates for presidential electors of such political party, whose names have been filed with the secretary of state.

WISCONSIN

Wisconsin Statutes 1949:

§ 6.23. . . . (9) In each year in which there is to be elected a president and vice-president of the United States, there shall be printed and provided for use in each precinct at the

general election a separate ballot, to be designed "Presidential Ballot," which shall be substantially in the form annexed, marked "C," except the party candidates shall be arranged from top to bottom according to rank in obtaining votes at the last preceding general election for governor, that is, the party receiving the largest vote will be placed first and the others in their corresponding position. The order of names of independent candidates for president and vice president shall be alphabetical according to the candidate for president, and such names shall follow the names of the party candidates for such offices.

(10) (a) At the top of each presidential ballot shall be placed in letters of not less than three-eighths of an inch in length the words "Official Presidential Ballot." Underneath the words "Official Presidential Ballot" and in plain, legible type shall appear the following instruction to voters: "Make a cross (X) or other mark in the square opposite the name of the candidates for whose electors you desire to vote. Vote in ONE square only."

NEW YORK

The New York Election Law, Section 248, prescribes the form of ballots to be used on voting machines. This section reads in part as follows:

"The party emblem for each political party represented on the machine, which has been duly adopted by such party in accordance with this chapter, and the party name or other designation, and a designating letter and number shall be affixed to the name of each candidate, or, in case of presidential electors, to the names of the candidates for president and vice-president of such party. . . ."

APPENDIX "D."

Historical Material on the Role of Presidential Electors.

1. Excerpts from Corwin, "The President—Office and Powers" (1948):

(a) "The power to determine the manner in which the Electors from any state shall be chosen is thus delegated to the legislature thereof for its exclusive determination, and the most diverse methods have been at various times resorted to. The history of practice in this matter is extensively reviewed in the Court's opinion in *McPherson* v. *Blacker*, decided in 1892. * * *

"In the first three presidential elections choice by the legislature itself was the usual method. In the election of 1824, when the choice fell eventually to the House, Electors were chosen by popular vote, either by districts or by general ticket in all but six states; and from 1832 till the Civil War they were chosen by popular vote and by *general ticket* in all states except South Carolina, where the legislature still chose. Since the Civil War there have been but two departures from the general ticket system. In 1876 in Colorado, which had been recently admitted into the Union, choice was by the legislature; and in 1892 Michigan, whose legislature was then in the hands of the Democrats, who however had no hope of retaining their hold on the state as an entirety in the approaching presidential election, choice was by districts, some of which went Democratic. There have also been cases in which individual Electors have, on account of personal popularity, been chosen by the minority party."

* * * * * *

"It was the belief of the Framers of the Constitution that the Electors would exercise their individual judgments

in the choice of a President, a belief which the universal understanding that Washington would be the first President, and probably for an indefinite number of terms, went to sustain. But the requirement that the Electors meet "in their respective states," which reflected the poor condition of travel in those days, destroyed the possibility of a deliberative body from the outset; and with the first avowed appearance of party organizations on a national scale, in consequence of Washington's announcement in 1796 that he would not stand for a third term, the Electors became promptly transmuted into party dummies, a character they have retained ever since."

Edward S. Corwin, "The President—Office and Powers" (1948), p. 50.

* * * * *

(b) "A half century later occurred the disputed election of 1876, and James Russell Lowell, who had been chosen by the Republicans as an Elector from Massachusetts, was besought to save the country from threatened civil war by casting his vote for Tilden. Lowell refused on the ground that he had been elected not as an individual but solely as a party representative.

> "I was nominated [said he] and elected by my fellow-citizens of the Republican party to give effect to their political wishes as expressed at the polls, and not to express my own personal views. I am a delegate carrying a definite message, a trustee to carry out definite instructions; I am not a free agent to act upon my own volition; in accepting a place on the Republican ticket I accepted all its limitations and moral obligations. . . . My individual sympathies and preferences are beside the matter; to refuse to comply with the mandate I received when I accepted my party's nomination would be treacherous, dishonorable, and immoral."

"Indeed, it was a former President's considered opinion that 'an Elector who failed to vote for the nominee of his

party would be the object of execration, and in times of very high excitement might be the subject of a lynching.' Theoretically, to be sure, the Electors retain their *constitutional* discretion as against any outside *legal* control. But what a totally hollow sham that is, is shown by the fact that in many of the states nowadays the names of the party choices for Elector do not appear on the ballot at all, and the voters vote only for their party."

Edwin S. Corwin, "The President—Office and Powers" (1948), p. 51.

2. Excerpt from Bryce, "The American Commonwealth" (1891):

"No part of their scheme seems to have been regarded by the constitution-makers of 1787 with more complacency than this, although no part had caused them so much perplexity. No part has so utterly belied their expectations. The presidential electors have become a mere cog-wheel in the machine; a mere contrivance for giving effect to the decision of the people. Their personal qualifications are a matter of indifference. They have no discretion, but are chosen under a pledge—a pledge of honour merely, but a pledge which has never (since 1796) been violated—to vote for a particular candidate. In choosing them the people virtually choose the President, and thus the very thing which the men of 1787 sought to prevent has happened,—the President is chosen by a popular vote. Let us see how this has come to pass. * * * The fourth election was a regular party struggle, carried on in obedience to party arrangements. Both Federalists and Republicans put the names of their candidates for President and Vice-President before the country, and round these names the battle raged. The notion of leaving any freedom or discretion to the electors had vanished, for it was felt than an issue so great must and could be decided by the nation alone. From that day till now there has never been any question of reviving the true and original intent of the plan of double election,

and consequently nothing has ever turned on the personality of the electors. They are now so little significant that to enable the voter to know for which set of electors his party desires him to vote, it is thought well to put the name of the presidential candidate whose interest they represent at the top of the voting ticket on which their own names are printed.

"The completeness and permanence of this change has been assured by the method which now prevails of choosing the electors. The Constitution leaves the method to each State, and in the earlier days many States entrusted the choice to their legislatures. But as democratic principles became developed, the practice of choosing the electors by direct popular vote, originally adopted by Virginia, Pennsylvania, and Maryland, spread by degrees through the other States, till by 1832 South Carolina was the only State which retained the method of appointment by the legislature. She dropped it in 1868, and popular election now rules everywhere. In some States the electors were for a time chosen by districts, like members of the House of Representatives. But the plan of choice by a single popular vote over the whole of the State found increasing favour, seeing that it was in the interest of the party for the time being dominant in the State. In 1828 Maryland was the only State which clung to district voting. She, too, adopted the 'general ticket' system in 1832, since which year it has been universal."

James Bryce, "The American Commonwealth (1891), Vol. I, p. 38.

* * * * *

3. Excerpts from Stanwood, "A History of the Presidency from 1788 to 1897" (1912):

(a) "No argument is needed to prove that the scheme of the fathers is not only impracticable, but that in its operation it would now be intolerable. Were electors to be chosen merely as party men, uncommitted to any candidates, one

of two things must happen. Either the choice of these candidates, after the appointment of electors, would be made in the utmost confusion, and would be attended with scandalous intrigues, perhaps with corruption; or, the election of a President would be thrown into the House of Representatives, not occasionally, but always. The most casual consideration of the subject will convince every thinking man that the system we have is far better than that which the fathers planned. We have, in the convention system, a device which substitutes the judgment of a whole party for that of the individual elector, and which enables the wishes of the largest party to be carried into effect, instead of being scattered and wasted. The new system may not, does not, carry out the exact intention of the Fathers, but it conforms to the letter of the Constitution."

Edward Stanwood, "A History of the Presidency from 1788 to 1897" (1912) p. 11.

(b) "[Referring to the Presidential election of 1796]. One vote for Jefferson in Pennsylvania deserves notice, since it is believed to have been given by the only elector in the history of the country who has ever betrayed the trust reposed in him by those who supported him. The closeness of the vote in Pennsylvania already has been recorded, and the fact that two Federalist electors slipped in. One of the two voted for Jefferson and Pinckney. The treachery of this elector was the subject of an exceedingly plain-spoken communication in the 'United States Gazette' from an exasperated Federalist. 'What!' he exclaimed. 'Do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to *act*, not to *think*.'"

Edward Stanwood, "A History of the Presidency from 1788 to 1897" (1912), p. 50.

4. Excerpts from Dougherty, "The Electoral System of the United States" (1906):

(a) "The electoral theory contemplated the emancipation of the electors from outside control: they were to be appointed in the several States independently. The idea of a general convention was discarded because of the subtle influence which might be employed to affect the action of an assembled body, and because of the difficulty in convening so large a gathering at the national capital. By the electoral plan the appointees of each State were to meet in that State and cast a secret ballot on the same day upon which the electors convened in all the other States, the intent being that each separate electoral college should, when making its choice, be unaware of the decision of the others. But in practical effect, the secret, independent, unpledged electors in a brief time became the absolute servants of party. Their action was early dominated by legislative and congressional caucuses, and when party conventions were developed, they became mere registers of the convention's will. Each elector thus became so completely an automaton that in ordinary circumstances he would not dream of exercising any freedom in the use of his ballot, for violation of his tacit pledge to the party that elected him would bring upon him all the odium attaching to a traitor."

J. Hampden Dougherty, "The Electoral System of the United States" (1906), p. 1.

(b) "The growth of democracy quickly revolutionized the plans of the framers of the Constitution. The independence which electors were to exercise in choosing a candidate for the presidency soon gave way to a positive obligation upon their part to obey the dictates of party. No presidential elector would today cast his vote for any presidential candidate other than the one selected by the party whose representative he himself is. In 1796 three Democratic

electors, passing over the preference of their party, voted for John Adams for the presidency. Elbridge Gerry, one of the electors selected by the Democracy of Massachusetts, voted for Adams in place of Jefferson, but subsequently explained his action by letter to Jefferson, evidently to the latter's satisfaction. Had two of the three Democratic electors who voted against their party's candidate voted for him, Jefferson would have succeeded to the presidency in 1797, instead of 1801. No one at the time questioned the propriety of the action of these electors; whereas, today, the exercise of such freedom would be deemed a breach of trust. Since 1796 there has been no well-authenticated case of an elector's failure to carry out his party's expectations."[1]

J. Hampden Dougherty, "The Electoral System of the United States" (1906), p. 17.

* * * * *

(c) "The electors were originally designed to be the agents of a State, armed with plenary authority to cast its vote for President and Vice-President in such manner as the agents themselves or a majority of them might will, all danger of abuse of the trust being intended to be averted by the selection of worthy and fitting instruments for the execution of this high office. The chief magistrate of the nation, according to the unsophisticated notions of our fathers, was to be the nominee of these electors. In the evolution of history, without a syllable of alteration in the text of the organic law, the nature of the agency of the

[1] "From the beginning," says Benton, "the electors have stood pledged to vote for the candidates indicated [in the early elections] by the public will; afterwards, by Congress caucuses, so long as these caucuses followed the public will; and since, by assemblages called conventions, whether they follow the public will or not. In every case the elector has been an instrument, bound to obey a particular impulsion; and disobedience to which would be attended with infamy, and with every penalty which public indignation could inflict. From the beginning these electors have been useless, and an inconvenient intervention between the people and the object of their choice, and in time may become dangerous. The institution should be abolished, and the election committed to the direct vote of the people!"

electors has been revolutionized; it has become a specialized agency never imagined by the framers of the Constitution. Electors are now the mere instruments of party, 'party puppets,' as Justice Bradley termed them, to perform a function which an automaton without intelligence or volition might as fittingly discharge. Ingalls hardly detracted from the dignity of their supposed office when he likened them to 'the marionettes in a Punch and Judy show.'"

J. Hampden Dougherty, "The Electoral System of the United States" (1906), p. 250.

(d) "Whatever the origin of the electoral plan, its failure in purpose is clear. The idea of the elector as an over-lord is not consonant with democratic institutions, and our institutions while not democratic at the outset have become increasingly so. Nominally free in Washington's day, the electors never dreamed of resisting the sentiment that universally acclaimed the father of his country the first President of the new Union. In Adams' time there were one or two electors who asserted their constitutional prerogatives, but the majority obeyed the desires of party leaders, and since that period the search is vain for the theoretical elector of the Constitution. Party spirit has deposed him and made him its tool. That elector would render himself infamous who, accepting the office upon the only possible conditions upon which it would be conferred,—which tacitly bind him to obey his party's behests,—should employ it to defeat the will of those who placed him in it."

J. Hampden Dougherty, "The Electoral System of the United States" (1906), p. 252.

5. Excerpts from Watson, "The Constitution of the United States" (1910):

(a) "One author[1] says: 'The legislature of the Commonwealth might order the election of the electors by universal suffrage or by a restricted suffrage, directly or indirectly, by district ticket or general ticket, by single or cumulative vote; or it might authorize the executive of the commonwealth to appoint them; or it might choose them itself; or cause them to be selected by any person and in any manner which it might deem suitable. It may, and it alone can, direct how a disputed election of the electors or any one of them shall be determined. It may, and it alone can, determine the qualifications of the electors, outside of the one qualification prescribed by the Constitution, viz., that they shall hold no office of trust or profit under the United States.'"

David K. Watson, "The Constitution of the United States" (1910), Vol. II, p. 1568.

* * * * *

(b) "Of the decline of the Electoral College President [Theodore] Roosevelt says:

'As a matter of fact the functions of the electorate have now by time and custom become of little more importance than those of so many letter carriers. They deliver the electoral votes of their States just as a letter carrier delivers his mail.'"

Quoted in David K. Watson, "The Constitution of the United States" (1910), Vol II, p. 1573, from Roosevelt, American Ideals, 159.

* * * * *

[1] Burgess, Constitutional Law, vol. 2, 216.

6. Excerpts from Johnsen; "Direct Election of the President" (1949):

(a) "In twenty-seven states candidates for presidential electors are nominated by party conventions, in seven by party primaries, and in eleven by party committees. The laws of Arkansas and North Carolina permit nomination either by party convention or primary. Pennsylvania has a unique and very realistic system in that the law provides that the presidential candidate of each party shall nominate the presidential electoral candidates for his party. The electors nominated in these various ways are, if elected, expected, and in some states required by law, to vote for their party's candidate. Three states, California, Oregon, and Massachusetts, go so far as to so bind their electors by law."

> Quoted in Julia E. Johnsen, "Direct Election of the President" (1949), p. 17, from testimony of Prof. Jacob Tanger in U. S. Senate Committee on the Judiciary Hearings on S. J. Res. 2, 81st Cong., 1st Sess., pp. 189-196.

* * * * *

(b) "In Pennsylvania and twenty-three other states the names of candidates for elector do not appear on the ballot. Only the names of the presidential and vice-presidential candidates and their party appear in the presidential elector section in these short ballot states and, if it is not expressly stated on the ballot, it is understood that when the voter marks a choice for these two candidates he is voting for the group of electors of their party. The lists of the party's nominees for electors in these states are held in escrow, as it were, by the secretary of state or some other state official designated by law, from whom they may be readily obtained by the inquisitive voter. Few of the voters know who are the nominees for electors, and few more know who have been elected electors. But who cares? The voter is quite satisfied when he learns immediately after

the November election that this or that party candidate for President won.

In New York a dual system of electing electors operates. The names of electoral nominees do not appear on the voting machine but are printed on the hand-marked ballots. Fifteen states print the names of the electoral and presidential candidates on the ballot, and nine states print the electoral but not the presidential and vice-presidential candidates. Under either of these systems where the electors' names appear on the ballots, the voter who is not overawed by party loyalty can distribute his vote among several lists of electors, but the almost universal provision on the ballots for voting for an entire block of party candidates with one mark reduces the likelihood of having electors elected from more than one party. State laws and party customs have in brief come to consider party candidates for electors as a unit and, following the almost uniform pattern of state election laws that a plurality only and not necessarily a majority of votes is sufficient to elect, it results in the election of that party's group of electors, listed or not on the ballot, which receives the highest vote. Consequently some one party acquires all the electoral votes of a state. After the November election the electors remain practically as anonymous as before. They have as so many votes been tabulated unofficially by states and nationally and for the general public the election is over. But under federal and supplementary state laws they are required to meet at their state capitals and cast their votes on the first Monday after the second Wednesday in December and forward their ballots to Washington to be officially counted and the result declared on the sixth of January following."

Quoted in Julia E. Johnsen, "Direct Election of the President" (1949), p. 19, from testimony of Prof. Jacob Tanger in U. S. Senate Committee on the Judiciary Hearings on S. J. Res. 2, 81st Cong., 1st Sess., pp. 189-196.

(c) "There is considerable variation among the states in methods now used to nominate candidates for the office of presidential elector. In twenty-seven states, electors are nominated by the state conventions of the respective parties; the law in ten states gives this power to the various party organizations; and in seven states electors must be nominated in primaries. In Arkansas, Maryland, and North Carolina, they may be nominated by either the primary or the convention method; and in Pennsylvania the law provides that the presidential nominee of each political party shall nominate as many persons to be the candidates of his party for presidential electors as the total number of electors to which the state is entitled. In November 1944, the Mississippi legislature nominated a slate of electors whose names were printed on a supplemental ballot, and the voter had his choice between the electors nominated by the parties and those nominated by the legislature."

Quoted in Julia E. Johnsen, "Direct Election of the President" (1949), p. 88, from Ruth C. Silva, "State Law on the Nomination, Election, and Instruction of Presidential Electors," American Political Science Review (1948), 42: 523-9.

(d) "Before 1832, several legislatures themselves selected the members of the state's electoral college, a practice followed by South Carolina until the Civil War. As every student of American government knows, in the period from 1788 to 1832, the popular selection of electors was established and real discretion on the part of electors in choosing a President and Vice President became a legal fiction. For a century, the practice has been for the electorate to choose

a set of electors, who, it is understood, will legally confirm the decision already made at the polls."

Quoted in Julia E. Johnsen, "Direct Election of the President" (1949), p. 87, from Ruth C. Silva, "State Law on the Nomination, Election, and Instruction of Presidential Electors," American Political Science Review (1948), 42: 523-9.

* * * * * *

(e) [This is an excerpt from a Report of a Select Committee of the Senate made January 19, 1826.]

"It was the intention of the Constitution that these electors should be an independent body of men, chosen by the people from among themselves, on account of their superior discernment, virtue, and information; and that this select body should be left to make the selection according to their own will, without the slightest control from the body of the people. That this intention has failed of its object in every election, is a fact of such universal notoriety, that no one can dispute it . . . Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment; on the contrary they give their vote, or bind themselves to give it, according to the will of their constituents. They have degenerated into mere agents, in a case which requires no agency, and where the agent is useless if he is faithful, and dangerous, if he is not. Instead of being chosen for their noble qualities set forth in the *Federalist*, candidates for electors are now most usually selected for their devotion to a party, their popular manners, and a supposed talent at electioneering, which the

framers of the Constitution would have been ashamed to possess."

Quoted in Julia E. Johnsen, "Direct Election of the President" (1949), p. 56, from Lucius Wilmerding, Jr., "Reform of the Electoral System," Political Science Quarterly (1949), 64: 1-23.

* * * * * *

(f) "In recent years, twenty-one states, by adopting the so-called 'presidential short ballot,' have recognized the obligation of the electors to vote in the electoral college for the presidential nominee of their party. These states do not print the names of the candidates for elector on the general election ballot, but instead place the name of the party's nominee for President and for Vice President under the party appellation. A vote for the presidential candidate is considered a vote for the entire list of electors nominated by that party. In twelve other states, the name of the presidential candidate appears on the ballot along with the names of his party's nominee for the Electoral College. New York actually is the thirteenth state in this list, but the presidential short ballot is used where voting machines are authorized. The laws of eight states require the names of the electors to be placed on the ballot and say nothing about the name of the presidential nominee or allow his name to be added to those of the electors. Only five states, by listing the nominees for electors while omitting the names of candidates for President and Vice President, adhere to the fiction of the people's choosing electors, who in turn freely elect the President and Vice President. Contrary to newspaper reports, Virginia is not one of these states . . . Finally, in South Carolina, where the Australian ballot is not in use, each party provides its own general ticket ballot for presidential electors. The name of the candidate and the office he seeks must be printed on the ballot, and it is left to the party to decide whether or not

to put the names of the presidential and vice-presidential candidates on the ballot."

Quoted in Julia E. Johnsen (1949) "Direct Election of the President, p. 89, from Ruth C. Silva, "State Law on the Nomination, Election, and Instruction of Presidential Electors," American Political Science Review (1948), 42: 523-9.

* * * * * *

7. Excerpts from Congressional materials:

(a) "*How the Electoral College System Operates.*

"As has been noted, all States now choose their electors by popular vote. Local and State party organizations prepare the slates of electors which are approved by party conventions or primaries. In 21 States the electors' names do not appear on the ballot, but in 4 States only the electors' names, and not those of the Presidential candidates, appear. Voters usually think of themselves as voting for the President and Vice-President when they go to the polls, but actually they vote only for the electors, even though they seldom know who the electors are."

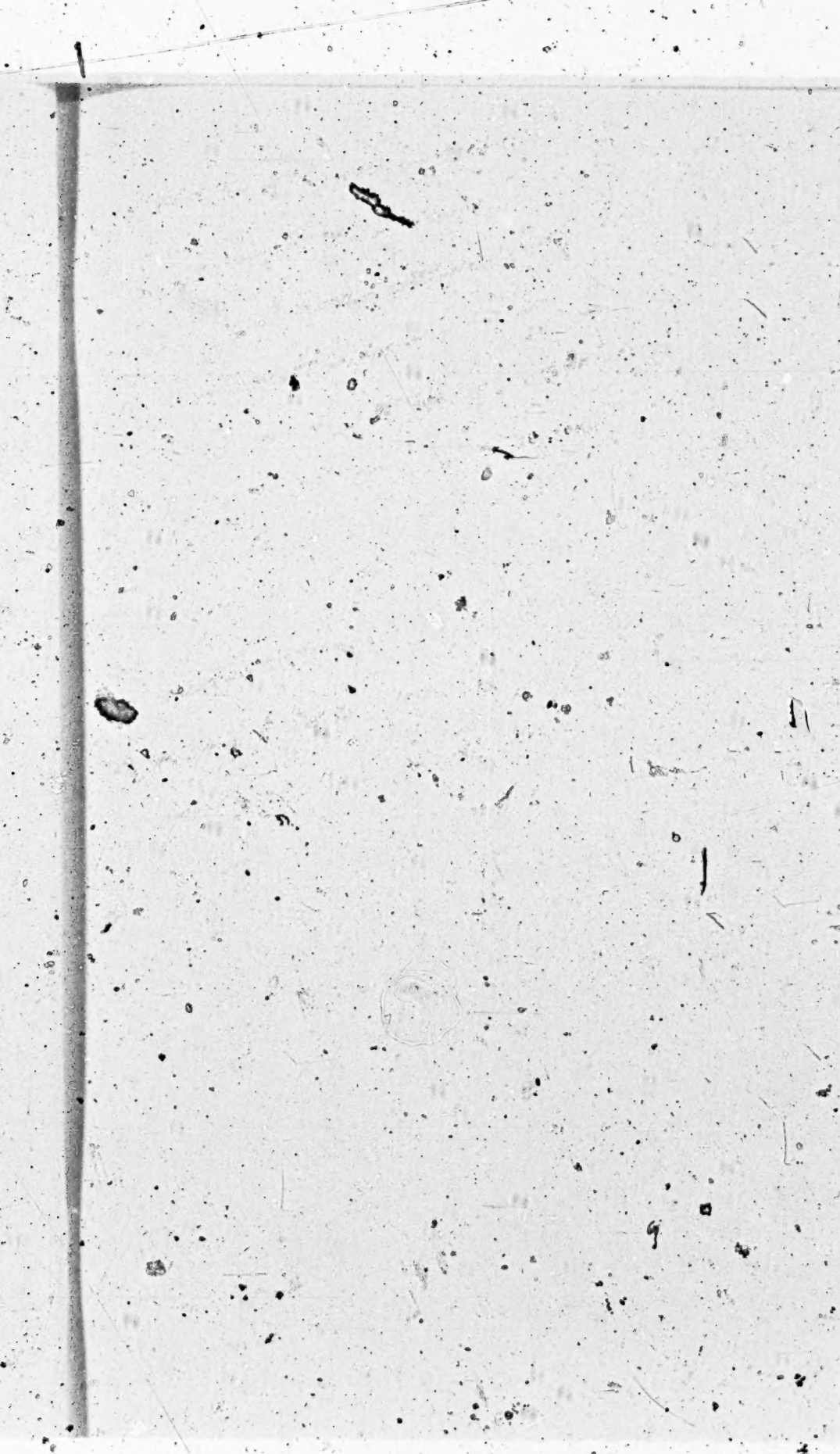
Library of Congress, Legislative Reference Service "Proposed Reform of the Electoral College, 1950," p. 3.

* * * * * *

(b) "By the Constitution it was intended that the electoral office should be one of the first dignity in the Republic. The electors were to be selected; men chosen by the people on account of their superior virtue and intelligence, and left to make choice of a President, according to their own enlightened understandings, without the slightest control from the less-informed multitude. This was the intention but the plan has wholly failed in the execution. The

electors are not independent; they have no superior intelligence; they are not left to their own judgment in the choice of President; they are not above the control of the people; on the contrary, every elector is pledged before he is chosen to give his vote according to the will of those who choose him. He is nothing but an agent, tied down to the execution of a precise trust."

Excerpt from speech of Hon. Thomas H. Benton of Missouri, in the U. S. Senate, February 3, 1824. U. S. Congress, House of Representatives, 44th Congress, 2nd Session, Miscellaneous Document No. 13, "Counting Electoral Votes," p. 728, Government Printing Office, 1877.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

PETITIONER'S BRIEF IN CONNECTION WITH THE STAY OF MANDATE.

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INDEX.

	Page
Petitioner's Brief in Connection With Stay of Mandate	1
Appendix "A"—Application for Stay (as filed on March 10, 1952)	5
Appendix "B"—Reply to Respondent's Objection to Petitioner's Application for Stay (as filed on March 17, 1952)	12
Appendix "C"—Petitioner's Opposition to Respondent's Motion to Vacate (as filed on March 25, 1952)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

PETITIONER'S BRIEF IN CONNECTION WITH THE STAY OF MANDATE.

In its order granting Petitioner's application for a stay of mandate, this Court granted the requested stay and provided that oral argument, scheduled for March 31, 1952, should be addressed both to the merits of the case and to the stay. Accordingly, this Brief is submitted to the Court, in connection with the stay of mandate which the Court granted on March 24. Simultaneously, a Brief on the merits is being submitted.

The Application for Stay in this matter was filed on March 10, and is attached hereto as Appendix "A". Peti-

tioner's Reply to Respondent's Objection to the Application for Stay was filed on March 17, and is attached hereto as Appendix "B". These were the two documents filed by Petitioner that were before the Court at the time the stay was granted. In addition, there is attached hereto, as Appendix "C", the document which Petitioner filed in opposition to Respondent's Motion to Vacate or Modify the Stay granted by the Court. Petitioner filed this latter document on March 25, and on that same date the Court denied Respondent's Motion to Vacate or Modify the Stay.

Under the circumstances referred to above, and as discussed in greater detail in the appendices hereto, it is submitted that the stay which the Court granted herein on March 24 was properly granted, and should not now be vacated or modified.

In appraising the Court's stay order, a brief timetable of the significant dates with respect to the forthcoming Alabama Primary election is appropriate.

Under the various provisions of Title 17 of the Alabama Code, this year's timetable for Alabama's election works out as follows:

1. The first primary is to be held on May 6, 1952. (Title 17, Alabama Code, Section 340.)

2. The second, or run-off primary, is to be held on June 3. (Title 17, Alabama Code, Section 340.)

3. Any subsequent special primaries that may be necessary are to be held "on such day as the governor may direct." (Title 17, Alabama Code, Section 216.)

4. If the result of the May 6 primary is contested (and a single qualified voter is permitted to contest such a primary), the Chairman of the State Democratic Executive Committee is empowered to call a meeting of the Executive Committee in order to decide such contest, and a new primary is authorized to be held in the event the contest cannot be decided by the Executive

Committee. (Title 17, Alabama Code, Section 374, Section 384, Section 386, and Section 388.)

5. Wholly aside from the possibility of special primaries as referred to above, the significant dates with respect to the May 6 primary can be summarized as follows:

(a) On or before March 1, each candidate desiring to run in the Democratic primary was required to submit his name to the Chairman of the Democratic Executive Committee. (Title 17, Alabama Code, Section 348.)

(b) On or before March 27, the Chairman of the Democratic Executive Committee was required to certify to the Secretary of State the names of all qualified candidates in the Democratic Primary. (Title 17, Alabama Code, Section 344.)

(c) On or before April 6, the Secretary of State is to notify the Probate Judges of the 67 counties in Alabama of the qualified candidates of all parties, in order that the Probate Judges may have the ballots printed. (Title 17, Alabama Code, Section 344.)

(d) On or before April 16, any candidate who has previously qualified, and who wishes his name omitted from the ballot, must notify the Probate Judges of the 67 counties, in order that his name may be omitted from the ballot when the actual printing of the ballots takes place. (Title 17, Alabama Code, Section 148.)*

(e) On or before May 3, the Probate Judge in each of the 67 counties in Alabama must deliver "election supplies and lists to the sheriff of the county." (Title 17, Alabama Code, Section 354.)

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* This Section of Title 17, as well as all other Sections, applies to primary elections as well as general elections, pursuant to Section 1 and Section 339 of Title 17.

(f) On or before 7:30 a.m. on May 6, the sheriff of each county must deliver such election supplies to the polling places in the county. (Title 17, Alabama Code, Section 354.)

As this statutory timetable clearly shows, there is no need to vacate or modify the stay order which the Court has granted in order to protect the Respondent against irreparable injury. As Section 148 of Title 17 makes clear, in no event will the actual printing of ballots begin prior to April 16. At least until April 16, therefore, the stay order does not prejudice Respondent in any way. A decision on the merits by that date will prevent any possibility of irreparable injury to Respondent. With respect to Petitioner, the Court's action in granting the stay constituted recognition of the grave injury which Petitioner would have sustained, if the stay had not been granted. The same reasons that led to the need for the stay, as set out in Appendix "A" hereto, continue to apply today, and will continue to apply throughout the pendency of this case.

In view of the statutory provisions enacted by the Alabama legislature, as referred to above, and in view of the timetable for the forthcoming Alabama primary elections, as summarized in this Brief, it is submitted that this Court acted properly in granting a Stay in this case, and it is further submitted that this Stay should not be vacated or modified.

Respectfully submitted,

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APPENDIX "A".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Application for Stay.

Ben F. Ray, Petitioner herein, prays that the judgment entered in this cause on February 29, 1952, by the Supreme Court of Alabama, affirming the judgment entered in this cause by the Circuit Court of Jefferson County, Alabama, be stayed pending the final determination of the cause by the Supreme Court of the United States.

1. *Nature of the Case.* The Supreme Court of Alabama has held, in this case, that a procedure for qualifying candidates for Presidential elector, established as provided by state law, is unconstitutional under Article II, Section 1 and the Twelfth Amendment to the United States Constitution. Specifically, the Court held the state procedure unconstitutional because this procedure requires a candidate for Presidential elector on the Democratic ticket to

pledge, as a condition precedent to running on the Democratic ticket, that he will support for President and Vice-President the candidates nominated by the National Convention of the Democratic Party.* The important Federal Constitutional issue at stake in this case was described as follows by the Supreme Court of Alabama, in its opinion below: "The question is a federal one, and there has been no authoritative pronouncement as to it."

2. *Procedural Aspects of the Case.* This suit was instituted by Respondent as a mandamus proceeding to compel Petitioner (as Chairman of the State Democratic Executive Committee of Alabama) to certify Respondent's name to the Secretary of State of Alabama, as a candidate for Presidential elector on the Democratic ticket. The Respondent had failed and refused to comply with the requirements for qualification as a candidate, including a failure and refusal to sign the required pledge. Nevertheless, the Circuit Court of Jefferson County, Alabama, awarded the mandamus prayed for, and the Supreme Court of Alabama affirmed on the grounds of unconstitutionality referred to above.

3. *Jurisdiction.* Jurisdiction of the Supreme Court to review this case on Petition for Certiorari rests upon 28 U.S.C., Sec. 1257 (3). Jurisdiction to issue the stay requested is granted by 28 U.S.C., Sec. 2101(f). Application for stay was made to the Supreme Court of Alabama, the Court below, and was denied on March 3, 1952, by Chief Justice J. Ed. Livingston.

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* The basic Alabama statute (Alabama Code, Title 17, Section 347) provides that "Every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein. . . ." Pursuant to this statute, the Alabama Democratic Executive Committee adopted a resolution setting forth qualifications for candidacy in the Democratic primary, including the pledge to support the party's nominees for President and Vice-President, already referred to above.

4. *The Reasons for Granting Certiorari.*

First: The case involves the constitutionality, under the Federal Constitution, of a procedure carrying out a state statute.

Second: The question decided below has not heretofore been decided by this Court.

Third: The decision below conflicts with, and jeopardizes, the historic policy of the Constitution and of this Court to commit to the State legislatures the procedure for the selection of electors.

Fourth: The decision of the Alabama Supreme Court conflicts with the election procedure established by statute in at least 21 states.

Fifth: The decision below conflicts with the procedure which has been established for more than 150 years and approved by this Court, whereby the electors perform a mere ministerial act, as agents of the voters who choose them, when they cast their ballots for President and Vice-President.

The five reasons for granting certiorari enumerated above speak for themselves. A few detailed aspects of the matter, however, merit brief discussion.

As has been indicated above, the Supreme Court of Alabama stated that the question which it decided "is a federal one, and there has been no authoritative pronouncement as to it."

Not only is the question a federal one, as stated by the Court below, but also it is a question which, in the form here presented, constitutes a substantial and important question of Constitutional law that has not heretofore been decided by this Court. Moreover, the decision of the Court below imperils the entire structure on which the two-party system in this country is based—for if it is to be true hereafter that a voter cannot have confidence that the elector for whom he casts his ballot will support the nominees of

the party to which the voter belongs, then the Court below has announced a new principle of Constitutional law which overturns the historic procedure whereby every President and Vice-President since George Washington has been elected. Further, it should be noted that the electoral procedure heretofore in effect has repeatedly been approved by this Court.

Thus, the decision below conflicts with statements of this Court that electors are chosen "simply to register the will of the appointing power in respect of a particular candidate." *McPherson* v. *Blacker*, 146 U. S. 1, 36 (1892).

Sixty-two years ago this Court said:

> "By the Constitution of the United States, the electors for President and Vice-President in each state are appointed by the State in such manner as its legislature may direct.... The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the Nation." *In re Green*, 134 U.S. 377, 379 (1890).

Furthermore, this Court has previously analyzed the history of the presidential election system and has concluded that the procedure for selecting electors was left "to the state legislatures...." *McPherson* v. *Blacker, supra.* Failure of this Court to protect the Petitioner and the Alabama procedure from attack through erroneous invocation of the Constitution will invite similar attacks upon the statutory electoral procedures of other states. This Court should not, by declining to take jurisdiction or by failing to grant the stay, make possible the culmination of the wrong committed by the Court below in the name of the Federal Constitution.

If, as held by the Court below, the nominating procedure adopted by Alabama Law violates the United States Constitution, it would seem to follow, based on a canvass of the laws of other states, that the statutory procedure employed in at least twenty-one states for the nomination and election of Presidential electors is invalid.

For the several reasons enumerated and discussed above, it is submitted that the issue here presented is a substantial federal question, not heretofore expressly decided, and the Supreme Court of the United States should grant a writ of certiorari in order that it may serve as the proper forum for the "authoritative pronouncement" referred to by the Supreme Court of Alabama.

5. *Reason for Requesting a Stay.* A stay is necessary in this case in order to protect the orderly election process authorized by a state legislature from court interference based on an erroneous interpretation and application of the United States Constitution.

Unless a stay is granted, the orderly election process established in Alabama pursuant to state statute will be disrupted. The Democratic primary in Alabama is scheduled to take place on May 6, 1952. The mandamus in this case, if not stayed, would compel the Petitioner to certify the Respondent's name to the Secretary of State for listing on the ballot as a Democratic candidate—and would compel Petitioner to so certify "not less than forty days prior to May 6, 1952." On or before March 27, therefore, unless the mandate below is stayed by this Court pending the action of this Court on the merits, Petitioner will be compelled by the order of the Court below to take a step which will inject confusion and chaos into the primary election scheduled to take place on May 6, through the placing of Respondent's name on the ballot, in the Democratic column, even though he has expressly refused to pledge himself to support the candidates selected by the National Convention of the Democratic Party.

Thus, a voter wishing to cast his ballot in the Democratic primary for a Presidential elector who will vote for the Democratic candidates for President and Vice-President will have no way of knowing, from the ballot itself, whether the candidates for elector listed in the Democratic column will in fact support the Democratic nominees for President and Vice-President. While a decision adverse to Petitioner

on the merits might lead to a similar result, certainly such a result should not be permitted to occur automatically through the failure to grant a stay.

A failure to grant the requested stay will also undermine the effectiveness of a related state election law. The Alabama Code (Title 17, Section 347) provides that authorization to vote in a party primary is limited to those who are "members of a political party entitled to participate in such primary election." The same provision of the Alabama Code provides that "Every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein. . . ." Accordingly, failure to grant the requested stay of mandate will not only make inevitable the chaos and confusion referred to above, but will also directly subvert the above-quoted provision of the Alabama Code.

On the other hand, the confusion and chaos referred to above can be wholly eliminated, if the judgment below be stayed as requested and this Court grants a prompt hearing on the merits. If this course is followed, the issue may be disposed of in ample time to permit an orderly primary election on May 6, 1952. See, e.g., *MacDougall* v. *Green*, 335 U.S. 281 (1948), which was argued on October 18, 1948, and decided on October 21, 1948, the judgment of the District Court having been entered on September 1, 1948, and the election which was the subject matter of that case being scheduled for November 2, 1948.

6. *Conclusion.* A certified copy of the opinion of the Court below is appended to this application.

The record in this proceeding has been filed with the Clerk of the Supreme Court of the United States; a petition for a writ of certiorari is in process of preparation and will be filed in the immediate future.

Wherefore, petitioner prays that the judgments and mandates of the courts below be stayed until final determination of the cause by the Supreme Court of the United States.

/s/ MARX LEVA
Counsel for Petitioner

APPENDIX "B"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Reply to Respondent's Objection to Petitioner's Application for Stay.

Ben F. Ray, Petitioner herein, presents this brief statement in answer to the grounds presented by Respondent in his "objection".

I.

In Respondent's first objection, he argues that Ben F. Ray, as Petitioner, has no authority to apply to this Court for a writ of certiorari or for a stay of mandate. The short answer to this contention is that Respondent made Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, a party defendant to this cause in the

Circuit Court of Jefferson County, Alabama. As such party, Ray may proceed with his defense, including appeals to the Supreme Court of Alabama and the instant petition to this Court. This seems obvious.

In addition to the fact that it was Respondent himself who initially filed suit against Petitioner, it should be noted that the Alabama legislature has enacted statutes conferring broad authority upon "the state executive committee of each party." Thus, the basic Alabama election statute provides that "Every state executive committee of a party shall have the right, power and athority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein . . . " Alabama Code, Title 17, Section 347, reprinted in Appendix "A" hereto.

Further, the basic election statutes of Alabama refer expressly to "The chairman of the state executive committee of each party" as the individual charged with the statutory responsibility of certifying to the Secretary of State of Alabama "the names of all candidates for nomination." See, e.g. Alabama Code, Title 17, Section 344, reprinted in Appendix "A" hereto.

Petitioner has authority pursuant to these statutes and the rules of the Democratic Party of Alabama to apply for a stay and for a writ of certiorari, if any such authority were needed in a case such as this where Ben F. Ray has already been made expressly a party defendant. The rules of the Democratic Party, attached hereto and made a part hereof as Appendix "B", designate the Executive Committee of the Party as the governing authority of the Democratic Party of Alabama. That Executive Committee in its Resolution of January 26, 1952, provided:

> "That if, in the opinion of the Chairman of this Committee, it becomes necessary or advisable for any further action to be taken in connection with such Primaries or the details pertaining thereto, the Chair-

man of this Committee is hereby fully authorized and empowered to act for and on behalf of the Committee.'"*

Respondent's contention on this point, if it had any validity, should have been raised in the Supreme Court of Alabama when Petitioner appealed to that Court. Respondent did not raise the point there. The point, if raised, would have had no merits there; it has no merit here.

II.

In Paragraph II of his objection, the Respondent asserts that the "decision and judgment of the Supreme Court of Alabama will not be reviewed by this Court" because, Respondent asserts, the Alabama decision "does not deny the constitutional right of any citizen", does not "aggrieve" the Petitioner, and involves a political question.

These arguments are in reality a single argument and are vulnerable to a short answer.

Respondent's contention ignores the plain wording of 28 U.S.C. 1257 (3). Section 1257 (3) gives this Court jurisdiction to review by writ of certiorari a final judgment or decree of the highest court of Alabama "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Respondent sets up a Federal Constitutional right to run as a candidate for Presidential and Vice-Presidential elector in the Democratic primaries of May 6 and June 3, 1952. In so doing he attacks the validity of that part of the Committee Resolution adopted January 26, 1952, which would bar him from such partici-

* This resolution is already part of the record filed in this Court pursuant to the petition for certiorari. As a matter of convenience, a copy of this resolution is attached to the instant statement as Appendix "C".

pation if he were unwilling to take a pledge to support the nominees of the Democratic National Convention. This Committee action was taken pursuant to Title 17, Section 347, Code of Alabama 1940, which empowers the Committee to set qualifications for participation as candidates in these primary elections. Thus, Respondent in effect attacks the validity of a State statute by attacking the validity of administrative action taken pursuant to a State statute.

In addition, Respondent most certainly claimed a "title, right, privilege or immunity" under the Federal Constitution.

The attack on the State statute has been made, and the right under the Federal Constitution has been drawn in question. This right was set up by Respondent. Petitioner may now ask this Court to decide whether the Supreme Court of Alabama correctly decided the Federal Constitutional question.

Respondent's argument that this Court is barred from exercising jurisdiction because the issue presented is a political one is paradoxical, since Respondent invoked the jurisdiction of the courts below to decide this question on the basis of the Federal Constitution. The Courts below did decide this question on the basis of the Federal Constitution, the Supreme Court of Alabama saying: "The question is a federal one and there has been no authoritative pronouncement as to it."

It seems clear that a political question is not involved in this case so as to constitute a bar to the exercise of jurisdiction by this Court. It is respectfully submitted that this Court so disposed of a similar contention in *McPherson* v. *Blacker*, 146 U.S. 1 (1892).

III.

In Paragraph III of his objection, Respondent asserts that he will be irreparably injured if his name is not printed on the ballot by April 6. If by this assertion Respondent means to suggest that this Court should take jur-

isdiction of the case and resolve the matter prior to April 6, we would welcome such expedited action. See, e.g., *MacDougall* v. *Green*, 335 U.S. 281 (1948).

However, we cannot agree with Respondent that he will be irreparably injured if the stay is granted and the case is still pending on April 6. Ballots can be reprinted after April 6 and prior to the May 6 primary, if that should be necessary—or special primaries can be held at any time prior to the national elections on November 6, if that should be necessary.

But there is another answer to Respondent's contention that either a stay or a judgment against him on the merits would cause him irreparable injury.

He cannot claim irreparable injury merely because he is denied the right to usurp the credentials of a candidate for the Democratic nomination when he has failed to satisfy the requirements established pursuant to state law for running in the Democratic primary. The only injury Respondent could possibly sustain would be a lack of permission to run on the democratic ticket. By agreeing to the qualifications established by the particular party, he can get his name on the ballot, without a day's delay, in the column of any party he intends to support. But he cannot, and should not, be permitted to run as a Democrat when he proclaims his intention of opposing the nominees of the Democratic party.

IV.

The litigation referred to in paragraph IV of Respondent's "objection" deals with eligibility to vote in a primary, and does not deal with eligibility to be a candidate in such a primary. This voter pledge litigation is of no moment in the case at bar. Even if the decision of the Circuit Court of Jefferson County, Alabama, were sustained by the Alabama Supreme Court in that case, the ballot pledge set forth in Title 17, Sections 350 and 352, Code of Alabama 1940, would remain. Since elector candidates were

nominees of the Democratic primary, it would still be a matter of extreme importance whether or not elector candidates were pledged to support the nominees of the National Democratic Convention.

In addition to his irrelevant reference to other litigation that is presently pending in Alabama, Respondent suggests that he will withdraw his name if this Court subsequently holds "that his name was improperly printed on the official ballot." This meaningless promise is, of course, completely beside the point. The mandamus order of the Alabama courts requires the Petitioner to certify the Respondent's name to the Secretary of State for inclusion on the ballot, on or before March 27, 1952. On or before that date Petitioner must certify the name in compliance with the mandamus order of the Alabama Courts. Clearly, such a situation calls for the granting of a stay, pursuant to the authority conferred on this Court by 28 U.S.C. Sec. 2101(f). We submit that this Court should not refrain from granting a stay on the basis of a meaningless promise by counsel for the Respondent, with respect to Respondent's future intentions.

Conclusion.

The decision of the Supreme Court of Alabama in this case was announced on February 29. On March 3 the Chief Justice of the Supreme Court of Alabama denied Petitioner's application for a stay. Petitioner's Application for Stay was filed in the Supreme Court of the United States on March 10. Respondent's "Objection to the Consideration of or to the Granting of the Application for Stay" was filed on March 14. The mandamus orders issued by the Alabama courts require Petitioner to certify Respondent's name to the Secretary of State of Alabama, as a candidate in the Democratic primary, unless a stay is granted by this Court prior to March 27. An important Constitutional law question is here presented, as the Supreme Court of Alabama has itself recognized. Further,

the time element lends great urgency to the Application for Stay.

Wherefore, for the reasons advanced in the Application for Stay and in this Reply, Petitioner prays that the judgments and mandates of the courts below be stayed until final determination of the case by the Supreme Court of the United States.

Respectfully submitted,

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TRUMAN M. HOBBS
Attorneys for Petitioner

APPENDIX "C".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649.

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Petitioner's Opposition to Respondent's Motion to Vacate.

Ben F. Ray, Petitioner herein, presents this brief statement in opposition to Respondent's Motion to Vacate the Stay granted by this Court on March 24, 1952:

1. The contentions presented by Respondent's Motion of March 24 do not differ in substance from the contentions that were before this Court when the Court entered its Stay Order of March 24.

2. In his Objection to the Granting of a Stay, as filed herein on March 14, Respondent contended that he would suffer irreparable injury "should the judgment of the Alabama Court be stayed beyond April 6, 1952." In our reply

to Respondent's Objection, we have already pointed out the fallacies in Respondent's claim that he will be irreparably injured—but even if his statement were to be taken at face value, it is the *April 6* date that he has heretofore claimed as the date of special significance to him. In view of the fact that this Court has granted both certiorari and a stay, and has scheduled oral argument for March 31 on both the merits and the stay, Respondent should not now be permitted to inject March 27, rather than April 6, as the crucial date.

3. Respondent will not be irreparably damaged by the granting of the stay for the reasons set forth in Petitioner's Reply to Respondent's Objection, at page 5.

Wherefore, Petitioner submits that Respondent's Motion to Vacate should be denied.

Respectfully submitted,

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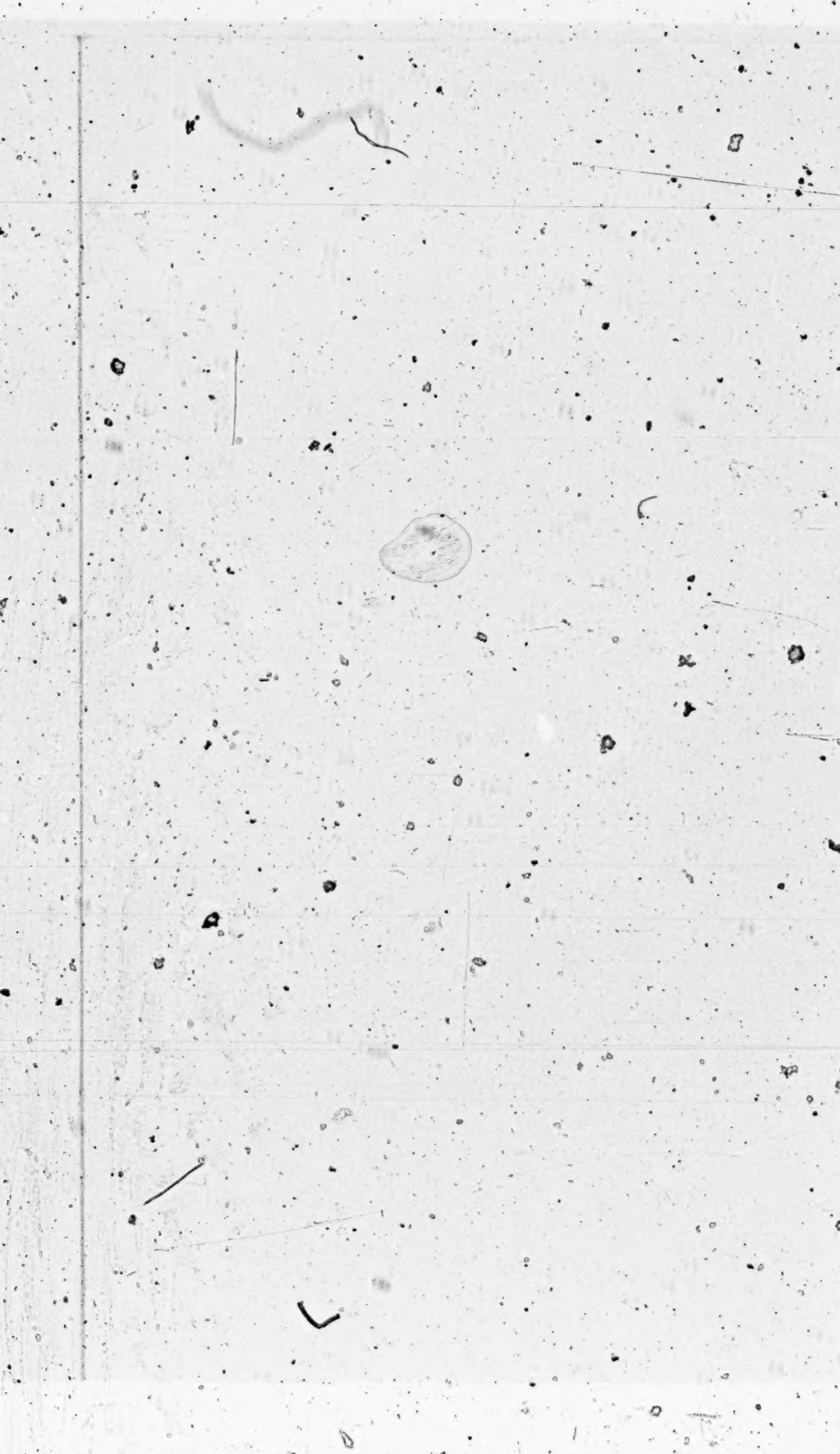

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, as Chairman of the State Democratic Executive Committee of Alabama, *Petitioner,*

v.

EDMUND BLAIR, *Respondent.*

BRIEF AND ARGUMENT FOR RESPONDENT

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SUBJECT INDEX.

	Page
Right of respondent to become a candidate in the primary	2
Elector can not be coerced	3
Harmonious construction of Twelfth Amendment	6
Alabama holding does not deprive voters of anything	7
Alabama Democrats can not be compelled to make up their minds now	11
Statutes of Twenty-One States	12
State v. *Wait* (Nebraska case)	13
Electors who will not vote for Truman are not inconsistent	13
Responsible party government	14
Pledge required coerces electors	15
The electors may seek the man	15
The pledge discriminates against electors and is meaningless as applied to others	16
Committee can not appoint Electors if it elects to hold a primary	16
Presidential electors have a right of franchise secured by the Constitution of the U. S.	16
Petitioner is not aggrieved by the Alabama decision	17
Conclusion	18
Appendix "A": Alabama Code, 1940, Title 17, § 222	20
Appendix "B": Alabama Code, 1940, Title 17, § 336	20
Appendix "C": Article, "A Republic—If you Can Keep It"	21
Appendix "D"	40

CITATIONS.

Cases Cited.

	Page
Baskin v. Brown, 174 Fed. 2d 391	9
Bliley v. Wert, 42 Fed. 2d 101	9
Davis v. Schnell, 81 Fed. Supp. 872	9
McPherson v. Blocker, 146 U. S. 1	4
Smith v. Allwright, 321 U. S. 659	3
State v. Fear, 142 Wisc. 320	7
State ex rel. Republican Committee v. Wert, 92 Neb. 313, 138 N. W. 159, 43 L.R.A. (N.S.) 292	13
U. S. v. Classic, 313 U. S. 399	2, 10, 17

Constitution.

Article 2, Section 1	2
Amendment 12	2, 6, 7
Amendment 14, Section 2	2, 17

Statutes.

Alabama Code 1940, Title 17, Sec. 222	2
Alabama Code 1940, Title 17, Sec. 336	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, as Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*,

v.

EDMUND BLAIR, *Respondent*.

BRIEF AND ARGUMENT FOR RESPONDENT

MAY IT PLEASE THE COURT:

This case involves the legality of an attempt, by a state agency, to coerce a would-be candidate, in the Alabama primary, for nomination for presidential and vice presidential elector, into agreeing to abandon, if nominated and elected, his individual judgment in the performance of a duty enjoined on him by the Twelfth Amendment to the Constitution of the United States.

The Supreme Court of Alabama ruled that the attempt was void being in violation of the Twelfth Amendment.

Respondent was denied the right to become a candidate by the Chairman of the State Democratic Executive Committee because he would not agree to aid and support the nominees of the National Democratic Convention for President and Vice President if Mr. Truman or anyone advocat-

ing his civil rights program is the nominee of that convention.

Where the state law has made the primary an integral part of the procedure of choice, and that is true in Alabama, or where in fact the primary effectively controls the choice, which is the case in Alabama,—a one-party state—the rights of the voter, secured by the Constitution, are the same in the primary and the general election. He has a right to have his ballot counted in the primary and in the general election. He has the same basic fundamental right to run in the primary, as in the general election. He cannot be denied a place on the ballot in the primary for a reason that would not exclude him from the ballot in the general election.

U. S. v. *Classic*, 313 U. S. 299, 318.

Alabama requires electors to be elected by popular vote.

Ala. Code 1940, Title 17, Section 222.

Article 2, Section 1, of the Constitution of the United States provides:

> "Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors," etc.

The Twelfth Amendment provides:

> "The Electors shall meet in their respective States and vote by ballot for President and Vice President," etc.

In Section 2 of the Fourteenth Amendment it is provided:

> "But when the right *to vote* at any election *for* the choice of *electors* for President and Vice President of the United States, * * * *is denied* to any of the male inhabitants of such State * * * *or in any way abridged*, * * * the basis of representation therein shall be reduced" * * * etc. (Italics ours)

A vote by ballot means an uncoerced ballot. The right to vote for Presidential and Vice Presidential electors (where the State requires them to be elected) is secured by the Twelfth and Fourteenth Amendments. If respondent cannot be excluded from the ballot in the general election solely because he will not agree to cast an electoral vote for Mr. Truman, if respondent is elected and Mr. Truman is nominated such reason furnishes no basis for excluding him from the primary where the primary effectively controls the choice.

The Constitution unequivocally vests the power and authority in, and makes it the duty of, the electoral college to vote for a president and vice president. There is no expressed limitation on the authority of the electors in choosing a president, other than the constitutional qualifications prescribed for a president, and there is no language in the instrument from which any limitation might be implied. The method provided by the Constitution for electing a president is exclusive. No other method is provided save and except the provision for an election by the House of Representatives in the event no person receives a majority of the votes in the Electoral College.

Whether an elector be a state officer or not is immaterial as we see it. In voting for a president in the electoral college, the elector is discharging a duty enjoined on him by the Constitution of the United States. Alabama has authorized the nomination of candidates for elector in a primary which is an integral part of the election.

Smith v. *Allwright*, 321 U. S. 659.

While the mode of appointment belongs to the state, the federal constitution defines the duty of the electors after their appointment in the following language:

> "The Electors shall meet, in their respective states, and vote by ballot for President and Vice President."

The duty to meet is enjoined. The place of meeting is designated. The method of choosing is prescribed. The officers to be chosen are named.

If the duty to meet and to choose by ballot, does not mean an uncoerced ballot; if it does not mean a ballot that represents the judgment and discretion of the elector casting it, then what kind of ballot does it mean? Do we know of any kind of a ballot in our procedure of choice other than an uncoerced ballot, a ballot that represents the deliberate judgment of the elector casting it?

The intention of the founding fathers that the electors should be free to exercise their judgment and discretion in choosing a President and Vice President is apparent from the language used, the system devised, the object to be accomplished, and contemporaneous history. Eleven proposals for the selection of the executive were considered by the Constitutional Convention of 1787 before the method in the Constitution was approved. The founding fathers earnestly sought a method of selecting the executive which would make him independent not only of the other branches of the federal government but of state and foreign governments also.

McPherson v. *Blocker*, 146 U. S. 1.

See "A Republic—if you can keep it" by Hon. Logan Martin, American Bar Association Journal, January, 1942, printed in the appendix.

They also entertained a fear of popular government in its broadest sense. That governments of and by the people might become arbitrary seems to have been taken for granted. To meet the situation the electoral college was invested with the right, power and authority to differ from caucuses, conventions, and all manner of groups respecting the individual who should be chosen President. The electoral college has never lost that right, power and authority. It is of the highest importance that its independence be

maintained. *Once the right to coerce the judgment of electors is recognized, the means and methods of coercion are only limited by the ingenuity of man.*

The independence of electors is some assurance that the National Convention will be inclined to nominate men of honor, virtue and integrity, who will not be turned down by the electoral college. The independence of the electors is a safeguard against undue influence by pressure groups on the convention. As long as the electors remain free, conventions are on notice that corruption in the nominating process or incompetence in the candidate may have to run the gauntlet of honest electors.

The fact that the deliberate judgment of the electors and the judgment of the conventions have coincided for the last one hundred years or more does not indicate that electors may not differ from a convention respecting the individual to be chosen for President. It only indicates that the necessity for differing may not have arisen during that time. Married people sometimes live the better part of a life time in harmony only to fall out with each other in their old age.

The fact that electors may have been chosen simply to register the will of the appointing person in respect to a particular candidate does not militate against respondent. He is seeking to ascertain the will of the Democrats of Alabama, and to use his best judgment in executing it. If the Democrats of Alabama do not want Mr. Truman for their President, Respondent will appeal to them. He is certainly entitled to use his judgment about an acceptable person when the time comes to vote in the electoral college.

When the constitution is considered as a whole, we think it apparent that the Twelfth Amendment contemplated that the electors should have the same freedom of action in the performance of their duties, as legislators enjoyed, at the time the Twelfth Amendment was adopted, in voting for United States Senators.

With respect to Senators the Constitution provided:

> "The senate of the United States shall be composed of two senators from each state, *chosen by the legislature thereof*" * * *. (Italics supplied)

With respect to a President and Vice President, the Twelfth Amendment provided:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors * * *." Article II, Section 1.
>
> "The electors shall meet in their respective states, and vote by ballot for president and vice president."

Was it ever contemplated that a Senator might be coerced into abdicating his right to use his individual judgment on important public questions before he could be eligible to be considered by the Legislature or qualify as a candidate in the primary? May the Democratic party in Alabama require a candidate to swear he will aid and support every plank in the platform adopted at the convention as the price of being allowed to become a candidate in the primary? Hasn't a Senator the right and isn't it his duty to oppose measures disapproved by his constituents? If a Senator may do so, may not an elector refuse to vote for an individual who is not acceptable to an overwhelming majority of the members of the party that nominated him?

In 1910 Wisconsin enacted a primary law which provided for the nomination of party candidates for the office of United States Senator at the primary election although the Constitution of the United States at that time provided for the election of United States Senators by the legislature.

The primary law was attacked on the ground that it operated to coerce the judgment and discretion of the legislature in choosing United States Senators, * * * and operated to secure their election by popular vote.

To rescue the statute from a sentence of judicial nullification on the ground that it was unconstitutional because it

was claimed members of the legislature were obligated to vote for the nominee of their party, the Supreme Court of Wisconsin declared that the law operated as a quasi-petition to the legislature and imposed no legal obligation on any member of the legislature to vote for his party nominee at the primary. In that way, the court kept the statute from being declared unconstitutional on the ground that it coerced the judgment and discretion of the legislature in choosing a United States Senator.

State vs. *Fear*, 142 Wisconsin 320.

We can think of no reason why electors should have less freedom of action in the performance of their duty to elect a President than legislators had in the performance of their duty to elect a United States Senator.

The legislatures never lost their right to freely exercise their judgment and discretion in electing a United States Senator until that right was taken from them by an amendment to the constitution.

The construction of the Twelfth Amendment we contend for would ascribe to it a meaning in harmony with the purpose of the primary law, which is voter control of political parties. It would be a recognition of the inherent and indefeasible right of the voters to nominate whom they will as the party's candidate to represent the people in the electoral college. The Democratic party in Alabama is an autonomous nominating body. The idea that it can be confined to those who agree to vote a certain way in nominating electors is preposterous.

The construction we contend for does not prevent the Democratic party in Alabama from being represented in the general election by candidates for electors who are willing to pledge blind allegiance to the nominee, yet to be named, of a convention yet to be held, on a platform yet to be written,—if the voters will approve them in the primary. *It only prevents the committee from excluding opposition to candidates who are willing to make a blind date with destiny.*

The construction advocated by the petitioner would operate to secure the election of a President and Vice President by popular vote—a method not recognized by the constitution. If election by popular vote was contemplated, why the provision for election by the House in event no candidate receives a majority of the votes cast in the electoral college?

If we are to have the election of a President by popular vote we must amend the constitution as was done when we changed the method of electing United States Senators.

Now let's examine the "messenger boy" status petitioner would have the court saddle on electors. If the object and purpose of the primary laws is to shift the burden of and responsibility for the election of a President from the electors, to the members of a political party; if the electors are to play the parts of automatoms and become mere passive instruments by and through whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primary, then how tremendously important it is that the voters at the primary be not restricted in their choice of candidates for nomination for electors to a group approved by the committee. If the voters are entitled to a representative in the electoral college, they are entitled to a representative who is at least free to vote in accordance with their wishes, if the representative desires to do so.

Suppose that two or three days before the November election the nominees of the National Democratic Convention die or resign, or become insane or it is discovered that a Benedict Arnold was nominated and he has fled the country and sought asylum in a foreign land. For whom would the messenger boy-electors cast their electoral votes? If they are chosen simply to register the will of the National Democratic Convention in respect to a particular candidate for President and that is the limit and extent of their authority, if the Democrats had an overwhelmning majority in the electoral college they could not in such circumstances

elect a President. The President would have to be elected by the House of Representatives, which might be overwhelmingly Republican. The founding fathers never contemplated any such ridiculous situation, which might readily result if a rubber stamp status is imposed on the electors. Neither custom, usage nor practice should be allowed to make the American people ridiculous. We should not be presented to the world as too inept to foresee and provide for possible situations of that kind.

We submit that these reasons lead irresistably to the conclusion that the electors have not lost their power to differ from conventions respecting a choice for President and Vice President, and that this power cannot be taken from them by a state, or a state agency.

II

But it is said that the Democratic party in Alabama, an agency of the state—*Davis* v. *Schnell,* 81 Fed. Supp. 872, affirmed 336, U. S. 933—may do what the State itself is powerless to do. What cannot be done directly may not be done indirectly.

Bliley v. *Wert,* 42 Fed. 2nd 101.
Baskin v. *Brown,* 174 Fed. 2nd 391.

The position of petitioner is that the executive committee may refuse to allow 300,000 democrats in Alabama to express themselves regarding electors, unless they express themselves one way. How absurd it is to say that the elector's judgment cannot be coerced after he is elected, but that it may be sufficiently coerced before he is elected to make coercion after election unnecessary. Petitioner, we submit, cannot be allowed to make a pledge of party loyalty serve the *purpose* of amending the Constitution and operate to secure the election of a President by popular vote.

Respondent's position is one of unqualified loyalty to the Democratic party in Alabama. He says if he is a candidate

in the May 6th primary he will support the nominees of that primary even though that means voting in the general election for Presidential and Vice Presidential electors who are pledged to vote in the electoral college for Mr. Truman or some one advocating his policies; but if respondent is nominated and elected he will not cast an electoral vote for Mr. Truman or any one advocating his civil rights program.

If the state cannot impose on a candidate the obligation to vote in a certain way, in order to get on the ballot in the general election, it is difficult to imagine how a state agency can impose the obligation as a condition to a place on the primary ballot in a state paid and state conducted primary, which in fact effectively controls the choice.

U. S. v. Classic, supra.

III

There is, as we see it, one glaring error in petitioner's argument that explains the conclusion reached that the Constitution has been amended by 100 years of practice, and that error is in claiming that "The Alabama holding effectively deprives the voters in that state of the opportunity of effective choice of a President of the United States. Petitioner's brief, p. 15.

The Alabama holding does not deprive the voters in that state of anything. There are candidates for nomination for election who are willing to accept the status of a messenger boy, and who have declared under oath that they will, if elected, cast their electoral vote for Mr. Truman or any one else nominated by the National Democratic Convention.

Manifestly a holding which offers the voter full opportunity to choose between two diametrically opposed views takes nothing from any one.

We have never contended that a candidate for nomination for elector may not make his views known, if he

desires to do so. Few, if any, can be nominated unless they announce their position. But for an individual to be forced to do so, and forced to announce that he will vote—not as the people want and not as his deliberate judgment dictates, but as the committee dictates, in order to get on the primary ballot, smacks too much of dictation to be associated with a republican form of government.

The Democrats of Alabama do not have to vote for respondent and his group unless they desire to do so. If they desire to do so they should not be denied their right to do so.

The Democrats of Alabama may well say that *they know now who they do not want for President,* but that they prefer to wait until after the Convention before deciding on the individual their judgment says should be the next President. They may say that the world picture is unclear; that no man knows what a day may bring forth; that war or peace with Russia in November would have a vital bearing on the man who should be voted for at that time; that whether we return to the gold standard, or further devalue the dollar in January 1953, may be of paramount importance to the country.

We know of no law that requires the Democrats of Alabama to irrevocably make up their minds on May 6th 1952 who their electoral vote should be cast for in November, 1952. We know of no law that prohibits them from reserving judgment on such matters, and saying, that they prefer to risk the judgment of eleven of their fellow Democrats, come November, about the best man for President, than to decide the matter now.

The respondent, and his fellow Democrats in Alabama have a right to have on the primary ballot, men and women who represent these views, and respondent has a legal right to a place on the ballot so those who advocate that course of action may cast a ballot that represents their views. Only by allowing the elector to use their judgment and discretion in November can the result suggested be worked out.

The petitioner would advance the general election in November to May 6th 1952 in Alabama.

Suppose that in November 1952, world conditions are such that the people of the nation are of the opinion that both major political partys made a mistake in their July nominations and that our safety and security calls for a man for President who shuns politics as he shuns the plague? Must we have a revolution to save the country? An electoral college authorized to use its judgment is a form of a safety valve that should not be junked in days of high pressure and tension.

The Twenty-one States

(Petitioner's brief, p. 19.)

Much is made by Petitioner of the alleged direct vote for President and Vice President in 21 states (pp. 11, 19, 20 and Appendix B).

(1) In the first place the proceedings in these States have no relation to the question here involved in the State of Alabama. They relate to the general election in November. We are here dealing with a primary.

(2) Furthermore, we are here questioning the power of a committee of a political party to control the vote of a Presidential Election in the Electoral College. That question is not involved in these 21 States.

(3) Petitioner states that in these 21 States the people vote directly for President and Vice President. His own presentation (Appendix B) of this question is a denial of his position. In each case it is a vote for the Electors for President and Vice President.

(4) At the time of this vote (November) the Electors in these States have already been nominated and are on file with the Secretary of State (of the State).

(5) The Constitution does not require the Electors' names to be printed on the ballot. The State legislatures

are free to choose any method of appointing the Electors. Some of these States took the names of the Electors off of the ballot because they complicated the use of the voting machines. The legislature of the State of Georgia has empowered the Governor to appoint the Electors in which case there will be no nomination and no election of them by the voters. In none of these cases does the question of the control of votes in the Electoral College arise. In the case of the twenty-one States they simply chose the general election as the procedure for the naming of the Electors to the Electoral College. Their statutes here cited by Petitioner clearly show that their legislatures had no intention of attempting to permit a direct vote for President and Vice President.

(6) The procedure in these 21 States does not involve any question of the function of the Electors in the Electoral College after the November election. They are nominated by political parties prior to November and these nominations are submitted under party labels to the voters in the general election. The highest slate wins and those nominees who won will go to the College in December. There they will, according to party loyalty vote for their party's candidates. That is the method chosen by these 21 States and there is nothing revolutionary about it.

IV

State ex rel. Republican Committee v. *Wait*, 92 Neb. 313, 138 N. W. 159, 43 L. R. A. (N. S.) 292, is based on the theory that the Roosevelt electors vacated their offices by accepting the nomination of the Progressive party for election. We have no quarrel with that case. It has no relevancy here. Respondent has no idea of becoming the nominee of a rival political party for election.

V

We challenge the statement, Plaintiff's brief, p. 22, that Democratic electors, by statements that they will not vote

for the National Party nominee, will be acting in a manner totally inconsistent with their nomination. If they are nominated for that very reason, how can it be claimed that they will be acting in a manner totally inconsistent with their nomination? This argument means that Alabama Democrats are tied to the chariot wheels of any individual who can control the National Democratic Convention. Are the chains that bind us so strong that our voluntary affiliation can not be terminated? Do we not have the right to "disaffiliate"?

Responsible Party Government

(Petitioner's brief, p. 24.)

Petitioner argues that the "concept of American democracy * * * is responsible party government" which he says is similar to that of the British parlimentary system. This is a misconception of the situation. The British have no written constitution and for this reason Parliament possesses the sovereign power and can change at will the form of the government as they have done. There is a party in power and an opposition but this has not in recent years led to stability.

The United States is not a democracy but a Constitutional Republic in a Union of sovereign States each with a Republican form of government.

We are governed by a written instrument of organic law which deliniates the respective powers of the States and the Federal Government. This Constitution can be amended when strong public opinion demands it, but this is a process of great and careful deliberation.

The Constitution has never recognized our political parties as having any responsibility for the operations of the Federal Government. Our parties are organized under the laws of the various States. Organically they are State parties. There are no national political parties in this sense. We have two principal party names but each has

become so divided in opinion on the principal issues of the day that public opinion cannot find a consistent expression in either.

So far as Alabama and several other Southern States are concerned there is in reality no two-party system at all. There is only one effective party and it is the Democratic Party of the State. In Alabama the Democratic primary is the election. The nominees of that primary are assured of election in November.

VI

It is said that "The Democratic Committee, by adopting a party loyalty pledge, has not dictated respondent's electoral vote. Brief, p. 25. That is true if the Court looks at form only. It is not true if the Court regards substance as paramount to form.

VII

It is also said "We submit he may not successfully claim a constitutional privilege to run as a Democrat and vote as a Republican." Brief p. 25. In the first place the record supports no such statement. In the next place this argument means that the Democrats of Alabama must vote for an office seeker, instead of seeking a man big enough for the job. That's a novel conception of the rights of 300,000 Democrats.

The United States of America never produced greater statesmen before or since the era in our history *when the people sought the man.*

VIII

In Section B of Petitioner's brief, p. 26, it is said that "The Committee action under attack in this case is a pledge to aid and support the nominees of the Democratic National Convention, required as a condition for participation as a candidate for Democratic Primary nomination in Alabama. Elector-candidates are included."

The pledge is meaningless as applied to all candidates, except Elector-candidates.

An individual may aid and support a candidate in one or more of three ways: (1) By voting for him. No *candidate* can vote for any individual for President. (2) By contributing his time, or (3) his money or other forms of property.

We sincerely submit that the committee does not possess the power of taxation. It would be unfortunate if it had the power to say, not only, that we must contribute time and money, but how much time and money we must contribute "to aid and support", in addition to the assessments we pay for becoming a candidate.

IX

It is mistakenly assumed on page 27 of Petitioner's brief that the Committee could have appointed eleven electoral candidates to run in the November election, and that Title 17, Section 336, Alabama Code 1940 gives the committee such power.

If the committee calls a primary nominations for elector must be made. The committee may determine the party officers to be voted for. It cannot determine the public officers to be voted for. See Title 17, Section 336 in the Appendix.

X

We answer petitioner's claim on page 29 of his brief that a presidential elector is assured no general right of franchise under any interpretation of the Federal Constitution by saying that the Constitution imposes the duty on him to vote by ballot for a President and the Constitution requires the basis of representation in any state to be reduced, if "the right to vote at *any* election"—primary or otherwise—for the choice of electors for President and Vice President is "*in any way abridged.*" How can he vote by ballot unless he is elected? How can he be elected unless he is nominated by the dominant party in a one-party state? How can he be nominated unless he is allowed

to become a candidate and to have a place on the primary ballot?

Respondent is excluded from the primary not because he is not a qualified voter; not because he does not meet all of the requirements laid down by the committee—save one—which is that he perform his official duties in the way the committee insists should be done, instead of in the way the Petitioner believes the Constituiton requires them to be performed. To deny him and all others a place on the primary ballot on that account is to abridge the right of 300,000 Democrats in Alabama to vote for their choice of electors.

If Petitioner can be excluded from the primary solely because of his loyalty to the Constitution of the United States that document is much weaker now than it was in the beginning.

If the right to vote at a primary for the nomination of a candidate for Congress, *U. S.* v. *Classic, supra,* is a right secured by the Federal Constitution, it would seem that the right to vote for the nomination of a member of the Electoral College is a right protected and secured by the Federal Constitution. If the right to vote is secured, it carries with it the right to become a candidate for such nomination if the voter possesses the qualifications required by law for holding the office. Of what value is the right to vote if the voter cannot have on the ballot a candidate who appeals to him, even if the candidate be none other than the voter himself.

XI

Petitioner claims that "Neither respondent nor the Court below has discovered how respondent has been injured in his constitutional rights. Petitioner should read the 14th Amendment. The shoe is on the other foot. How has the Chairman of a Committee been injured by the decision rendered by the Supreme Court of Alabama. Does a political party, as such, have any constitutional rights? Does the Chairman of the Executive Committee of a political party,

as such, have any constitutional rights? Whose constitutional rights were denied by the Supreme Court of Alabama? The only party litigant before that court with constitutional rights was the respondent. That court's decision that respondent has certain constitutional rights, is not a denial of a single constitutional right of any other person. Even if the Supreme Court of Alabama is in error in saying that candidates for election cannot be coerced, such holding violates no constitutional right of any one else, and there is nothing here for the Court to review. What provision in the Constitution gives Petitioner, or the party a constitutional right to coerce anyone?

Correction.

Petitioner's copy of Act 386, now Sec. 226, Title 17, Ala. Code of 1940, on page 32 of Appendix "A" overlooks the amendment to that Statute approved Aug 28, 1951,—Act #557, 1951 Session Alabama Legislature, omitting any reference to how electors shall cast their ballot.

Conclusion

So much emphasis has been laid upon the duty of the party and the rights of the respondent, that we fear that the rights of 300,000 Democrats in Alabama have been more or less ignored.

Bluntly put this whole scheme was arranged to obtain court approval of a handful of men telling 300,000 Democrats in Alabama to vote for Truman electors or get out of the party. If the Constitution of the United States protects that kind of action we have misread the document.

Respectfully submitted,

HORACE C. WILKINSON,
Attorney for Respondent.

Certificate

I have delivered a copy of the foregoing brief and argument to Marx Lera, Esq., opposing counsel of Washington, D. C., on this the 29th day of March, 1952.

HORACE C. WILKINSON.

APPENDIX "A".

Alabama Code, 1940, Title 17, § 222.

§ 222. (536) (446) (1653) (435) (342) (388) (339) **Presidential electors and representatives in congress to be elected.**—On the day prescribed by this Code there are to be elected, by general ticket, a number of electors for president and vice-president of the United States equal to the number of senators and representatives in congress to which this state is entitled at the time of such election; and there shall be elected one representative in congress for each congressional district.

APPENDIX "B"

Alabama Code, 1940, Title 17, § 336

§ 336. Election by party as to whether it will come within primary law.—A primary election, within the meaning of this chapter, is an election held by the qualified voters, who are members of any political party, for the purpose of nominating a candidate or candidates for public or party office. Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law. All political parties are presumed to have accepted and come under the provisions of the primary election law, but any political party may signify its election not to accept and come under the primary election law by filing with the secretary of state, at least sixty days before the date herein fixed for the holding of any general primary election, a statement of the action of its state executive committee, certified by its chairman and secretary, which statement shall contain a copy of the resolution or motion adopted declining to accept and come under the primary election law. If a political party declines to accept and come under the primary election law it shall not change its action and accept and come under the primary election law until after the next general election held thereafter. The state executive committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this chapter unless the method of their election is otherwise directed by the state executive committee of the party holding the election. (1931, p. 73.)

APPENDIX "C"

"A Republic—If You Can Keep It"

By Wm. Logan Martin
of the Birmingham (Alabama) Bar

So intent was the Constitutional Convention of 1787 in securing a method of selecting the executive which would make him independent not only of the other branches of the federal government but of state and foreign governments also, that the Convention in determining on a plan considered the following eleven proposals for his selection:

1. By the National Legislature (Congress);
2. By the People;
3. By the Electors (a) Chosen by the State Legislature,
   (b) Chosen by the People;

And if the Electors should fail to Elect, That Selection Be Made

4. (a) By the Senate, or
5. (b) by the House and Senate, or
6. (c) By the House;
7. By the Second Branch of the Legislature (Senate);
8. By the State Executives;
9. By State Executives with Advice of State Councils;
10. By State Legislatures;
11. By the States, Each of Which Would Vote for a Different Executive and from the Number Thus Selected either the National Legislature or Electors Appointed by the National Legislature Would Select the Executive.

1. By the National Legislature

This was first proposed as the Virginia Plan.[1] It was said that as the executive was only an institution for carrying the will of the legislature into effect, the latter ought to appoint an executive who would be accountable to that body only.[2] He should be absolutely dependent on the legislature, an independence of the executive from the legislature being the very essence of tyranny.[3] The sense of the nation would be better expressed by the legislature.[4] If

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[1] Formation of the Union, Government Printing Office, Sixty-Ninth Congress, First Session, House Document No. 398, p. 117, May 29, 1787.

[2] Ib. p. 132, Mr. Sherman—June 1. 22 of the 39 signers spoke on this general subject.

[3] Ib. p. 134, Mr. Sherman—Ib.

[4] Ib. p. 392, Mr. Sherman—July 17.

the salary of the executive should be fixed, and he be made ineligible for a second term, there would not be such a dependence on the legislature as opponents of the plan imagined.[5]

The objections made to this plan were many. There would be a constant intrigue for the election; the legislature and the candidates would bargain and play into one another's hands; votes would be given under promises and expectations of recompensing the members of the legislature by services to them or to their friends.[6] The executive would be the mere creature of the legislature so appointd and must needs be impeachable by that body. It would be a work of intrigue, of cabal and of faction, like the election of a pope by a conclave of cardinals; real merit would rarely be the title of appointment.[7]

Since it was admitted to be a fundamental principle of free government that the legislative, executive and judicial powers should be *separately* exercised, it was equally fundamental that they be *independently* exercised. There is the same and perhaps a greater reason if the executive should be independent of the legislature that the judiciary should be so. A coalition of the executive and legislative would be more immediately and certainly dangerous to public liberty. Therefore the appointment of the executive should either be drawn from some source or held by some tenure that would make him a free agent with regard to the legislature, and this could not be if he were appointable from time to time by the legislature. It was not clear that such an appointment in the first instance, even with ineligibility afterwards, would not establish an improper connection between the two departments.[8] In addition to the general influence of that mode on the independence of the executive, the election would agitate and divide the legislature so much that the public interest would materially suffer thereby. The candidate would intrigue with the legislature, would derive his appointment from the predominant faction, and be apt to render his administration subservient to its views.[9]

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[5] Ib. p. 393, Mr. Williamson—Ib.
[6] Ib. pp. 136-7, Mr. Gerry—June 2.
[7] Ib. p. 392, Mr. Govr. Morris—July 17.
[8] Ib. pp. 412-13, Mr. Madison—July 19.
[9] Ib. pp. 449-50, Mr. Madison—July 25.

Foreign ministers would exercise their influence on the legislature in order to gain an appointment favorable to their wishes. Germany and Poland were witnesses of this danger. In the former the election of the head of the empire, until it became in a manner hereditary, interested all Europe and was much influenced by foreign interference. In Poland, although the elective magistrate had very little real power, his election had at all times produced the most eager interference of foreign princes, and had in fact at length slid entirely into foreign hands.[10] It would be difficult to avoid cabal at home and influence abroad.[11] The legislature would exercise undue influence with the executive. It would be unstable in its councils. An ambitious man would be unwilling to take any step that might endanger his popularity with the legislature. Impeachment is essential to deal with misconduct, and so the body selecting the executive would face the problem of impeaching its own choice. This mode was the worst.[12] The executive would be uninterested in maintaining the rights of his office, which would lead to legislative tyranny. If the executive is dependent on the legislature, the latter could perpetuate and support their usurpation by the influence of tax-gatherers and other officers, by fleets, armies, etc. The executive would be interested in courting popularity in the legislature by sacrificing his executive rights. To that method cabal and corruption are attached.[13]

Nevertheless on June 2, the 8th day, the convention voted 8 to 2 in favor of this method, with the limitation that the executive hold office for one term of seven years.[14] On July 26, the 53rd day, the question was reconsidered and a favorable vote was again cast, but by a vote of 7 to 4.[15]

Eligibility for Reelection

This is one of the most interesting chapters of the proceedings. The question of succession was one of deep concern to the Founders. Having just wrested their independence from the Crown they were determined not to run the risk of another ruler. It was contended on the one hand that the executive ought to be so constituted as to be the great protector of the mass of the people; and unless he were eligible to reelection it would destroy the great in-

10 Ib. p. 450, Mr. Madison—July 25; p. 452, Mr. Mason—Ib.

11 Ib. p. 452, Mr. Butler—Ib.

12 Ib. p. 453, Mr. Govr. Morris—Ib.

13 Ib. pp. 611-12, Mr. Govr. Morris—August 24.

14 Ib. p. 137—The convention adjourned on the ninetieth day.

15 Ib. p. 457, Mr. Mason.

citement to merit public esteem by taking away the hope of being rewarded with a reappointmnt. It would tempt the executive to make the most of the short space of time allotted to him, to accumulate wealth and to provide for his friends. It would produce violations of the very constitution it is meant to secure.[16] The people at large would choose wisely;[17] and as a new legislature would have intervened before the executive's second term he would not depend for his second appointment on the same set of men as his first was rceived from.[18]

Rotation in office would not prevent intrigue and dependence on the legislature. The man in office would look forward to the period when he would become reeligible and he would be unwilling to take any step which might endanger his popularity with the legislature.[19]

On the other hand it was urged that, since there appeared no way to make the executive independent of the legislature but to give him his office for life or to make him eligible by the people,[20] he should not be left under a temptation to court a reappointment. If he should be reappointed by the legislature he would be no check on it. It had been said that a constitutional bar to reappointment would inspire constitutional endeavors to perpetuate himself. It may be answered that his endeavors could have no effect unless the people were corrupt to such a degree as to render all precautions hopeless; to which may be added that this argument supposes him to be more powerful and dangerous than other arguments admit, and consequently calls merely for stronger fetters on his authority. Mr. Randolph thought that ineligibility would be more acceptable to the people.[21] Mr. Ellsworth thought that the most eminent characters would be willing to accept the trust under this condition.[22] It was better for the executive to continue ten, fifteen or even twenty years and be ineligible afterwards,[23] thought Mr. Gerry. Any length of time agreed to would be preferable to the dependence which must result from eligibility to reelection, thought Mr. Wilson.[24] Mr. Charles Pinkney thought that no person should be eligible for more

16 Ib. p. 409, Mr. Govr. Morris—July 19.
17 Ib. p. 412, Mr. King—Ib.
18 Ib. p. 442, Mr. Strong—July 24.
19 Ib. p. 453, Mr. Govr. Morris—July 25.
20 Ib. p. 411, Mr. Govr. Morris—July 19.
21 Ib. pp. 411-12—July 19.
22 Ib. p. 444—July 24.
23 Ib. p. 444—July 24.
24 Ib. p. 444—Ib.

than six years in twelve years.[25] A second election ought to be absolutely prohibited. The primary object being the preservation of the rights of the people, it was an essential point, the very palladium of civil liberty, according to Mr. Mason, that the great officers of state, and particularly the executive, should at fixed periods return to that mass from which they were first taken, in order that they may feel and respect those rights and interests which are again to be personally valuable to them.[26] If the executive is made reeligible it would endanger the public liberties,[27] thought Mr. Charles Pinkney. The term should be limited to seven years,[28] said Mr. Rutledge.

On June 2 it was voted that the executive be ineligible after seven years—7 ayes and 2 noes.[29] On July 17 the clause "to be ineligible a second time" was stricken by a vote of 6 ayes, 4 noes.[30] On July 19 the question of eligibility arose again (after the convention had on the same day voted for a selection by electors) and the convention again voted against ineligibility for a second term—2 ayes and 8 noes.[31]

On July 26 the provision that the executive be appointed for seven years and be ineligible a second time was reinstated—7 ayes, 3 noes.[32]

On the question whether the term shall be seven years, the vote was 3 ayes, 5 noes.[33] On the question for six years the vote was 9 ayes, 1 no.[34] After the Report of the Committee of Eleven fixing the term at four years[35] a further attempt was made to change the term. It was moved that it be seven years instead of four, which was defeated—3 ayes, 8 noes.[36] It was again moved that the term be six years instead of four, and this was defeated—2 ayes, 9 noes.[37]

It was moved that if the president should be reeligible the choice in his second term should be made by electors

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25 Ib. p. 452—July 25.
26 Ib. p. 457—July 26.
27 Ib. p. 663—Sept. 4.
28 Ib. p. 668—Sept. 5.
29 Ib. p. 144.
30 Ib. p. 396.
31 Ib. p. 415.
32 Ib. p. 457.
33 Ib. p. 415—July 19.
34 Ib.
35 Ib. pp. 659-60—Sept. 4.
36 Ib. p. 676, Mr. Spaight and Mr. Williamson—Sept. 6.
37 Ib. p. 676—Sept. 6.

appointed by the legislatures of the states for that purpose.[38] The motion was lost—4 ayes, 7 noes.[39]

The proposal that no person be eligible for more than six years in any twelve years was defeated.[40]

2. By the People

For the election by the people it was argued that the powers of both branches of the legislature should be derived from the people without the intervention either of state legislatures or executives, in order that all three departments should be as independent as possible of each other as well as of the states.[41]

The people would never fail to prefer some man of distinguished character or services, some man of continental reputation.[42] It was the best mode.[43] The people are the best and purest source.[44]

There were objections to this plan. It was impracticable.[45] The people were too little informed of personal characters in large districts and were liable to deception.[46] They would never be sufficiently informed of characters and would never give a majority of votes to any one man. They would generally vote for some man in their own state, and citizens from the larger state would have the best chance for election.[47] The right of suffrage was much more diffuse in the northern than in the southern states, and the latter could have no influence in the election on the score of their negroes.[48] There was a disposition in the people to prefer a citizen of their own state and this would result in a disadvantage to the smaller states.[49] The matter of the sizes of the different states was unanswerable; the citizens of the larger states would invariably prefer the candidate

38 Ib. p. 449, Mr. Ellsworth—July 25.
39 Ib. p. 452—July 25.
40 Ib. pp. 452, 455, Mr. C. Pinkney—July 25.
41 Ib. p. 135, Mr. Wilson—June 1.
42 Ib. p. 392, Mr. Govr. Morris—July 17.
43 Ib. p. 453, Mr. Govr. Morris—July 25.
44 Ib. p. 455, Mr. Dickenson—Ib.
45 Ib. p. 135, Mr. Mason—June 1.
46 Ib. p. 137, Mr. Gerry—June 2.
47 Ib. p. 392, Mr. Sherman—July 17.
48 Ib. p. 413, Mr. Madison—July 19.
49 Ib. p. 451, Mr. Madison—July 25.

within their own state.[50] To refer the election to the people would be so complex and unwieldy as to disgust the states.[51] The people of the smaller states would be placed under a disadvantage.[52] A popular election is radically vicious. The society of respectable men like the Order of the Cincinnati would be so influential as to delude the people into any appointment which the Order supported.[53] This Order, for the members of which great respect was felt, should never have a predominating influence in the government.[54]

On July 17 the convention voted against the election by the people—9 noes, 1 aye.[55] The matter came up again on August 24, the 70th day, and the vote was 9 noes to 3 ayes.[56]

3. By Electors

When the Virginia Plan for the selection of the executive by the legislature was under discussion on June 2, the 8th day, Mr. Wilson offered as a substitute the gist of the plan which was later adopted. He moved that the states be divided into districts, each district to name an elector who should ballot for the executive but could not elect one of their own number. In support of this method it was argued that it would produce more confidence among the people than an election by the legislature.[57] It would obviate the disparity of population between the northern and the southern states and seemed liable to fewest objections.[58] The best men of the state would not hold it derogatory from their character to be electors.[59] The electors chosen for this occasion would meet at once and proceed immediately to an appointment and there would be little opportunity for cabal or corruption.[60] The selection of electors by the people would introduce an element of chance, but it would diminish if not destroy cabal and depend-

50 Ib. p. 452, Mr. Ellsworth—July 25.
51 Ib. p. 452, Mr. Butler—Ib.
52 Ib. p. 454, Mr. Williamson—Ib.
53 Ib. p. 454, Mr. Gerry—Ib.
54 Ib. p. 456, Mr. Mason—July 26—The membership of the Order in the United States today is approximately 1350—Roster Society of the Cincinnati 1938.
55 Ib. p. 395, Mr. Govr. Morris.
56 Ib. p. 610, Mr. Carroll.
57 Ib. p. 136, Mr. Wilson—June 2.
58 Ib. p. 413, Mr. Madison—July 19.
59 Ib. p. 442, Mr. Gerry—July 24.
60 Ib. p. 451, Mr. Madison—July 25.

ence.[61] It would avoid the danger of intrigue and faction which would affect an appointment made by the legislature; it would avoid the inconvenience incident to ineligibility for reelection, which should be forbidden if the selection were made by the legislature, and it would avoid the danger incident to impeachment of a president appointed by the legislature; and it would make the executive entirely independent of the legislature. No one had appeared to be satisfied with appointment by the legislature.[62]

Among the objections offered to an election by the people were the following: The electors chosen by the people would stand in the same relation to the people as the state legislatures, and yet their election would require similar trouble and expense.[63] It was extremely inconvenient and expensive to draw men together from all states for the single purpose of electing a Chief Magistrate.[64] Capable men would not undertake the service of electors from the more distant states.[65] The electors would be objects of the gratitude of the executive selected by them, just as much as if he had been selected by the national legislature. The introduction of a new set of men like the electors would make the government too complex.[66] The proposed electors would not be men of the first or even the second grade in the states.[67] Moreover an elector after voting for his favorite fellow citizen might throw his second vote away in order to insure the object of his first choice.[68]

Mr. Wilson's substitute was negatived the day it was offered—June 2—8 noes and 2 ayes.[69] On July 19 the convention reversed its former position and voted for the selection of the executive by electors—6 ayes, 3 noes.[70]

It was moved that the electors should not be members of the national legislature nor officers of the United States, nor be eligible to the supreme magistracy; and this motion was agreed to.[71]

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61 Ib. p. 453, Mr. Govr. Morris—Ib.
62 Ib. pp. 662-3, Mr. Govr. Morris—Sept. 4.
63 Ib. p. 137, Mr. Williamson—June 2.
64 Ib. p. 441, Mr. Houston—July 23.
65 Ib. p. 442, Mr. Houston—July 24.
66 Ib. p. 442, Mr. Strong—July 24.
67 Ib. p. 442, Mr. Williamson—Ib.
68 Ib. p. 454, Mr. Madison—July 25.
69 Ib. p. 137.
70 Ib. p. 414, Mr. Ellsworth.
71 Ib. p. 422, Mr. Gerry and Mr. Govr. Morris—July 20.

On August 24 we find the convention again considering the selection of the executive, the draft presented providing that the executive power shall be vested in a single person elected by ballot of the legislature, to hold office for seven years and to be ineligible for a second term.[72] The matter was in this stage when it was referred on August 31 with other troublesome problems to the Committee of Eleven;[73] and the Committee of Eleven reported on September 4 that the executive be elected as follows: Each state to appoint in such manner as its legislature may direct a number of electors equal to the whole number of senators and members of the House of Representatives to which the state may be entitled in the Congress; the electors are to meet in their respective states and vote for two persons, of whom one at least shall not be an inhabitant of the same state as themselves; and the Congress may determine the final choosing and assembling of the electors, and the manner of certifying and transmitting their votes; the person "having the greatest number of votes shall be the President, if such number be a majority of that of the electors"; and if no candidate has a majority vote the senate shall immediately choose by ballot "one of them [the candidates] for President."[74]

Motion was made to insert in the report "but no person shall be appointed an elector who is a member of the legislature of the U. S., or who holds any office of profit or trust under the U. S." which passed *nem: con:*[75] and the report was amended accordingly.[76]

The final report of the Committee on Style and Arrangement contained substantially the same terms relating to electors as are in the Constitution today, the report containing the words "but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States";[77] while the verbiage of the Constitution is, "but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."[78]

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72 Ib. p. 609.
73 Ib. p. 655.
74 Ib. p. 660.
75 Ib. pp. 672-3, Mr. King and Mr. Gerry—Sept. 6.
76 Ib. p. 679—Sept. 6.
77 Ib. pp. 702, 709—Sept. 12.
78 Art. 2, Sec. 1, Cl. 2.

Method of Selecting Electors—By the State Legislature or by the People

The method of selecting the electors came in for consideration—whether by state legislatures or by the people of the states.

One member preferred letting the legislatures nominate and electors appoint.[79] Another liked best an election by electors chosen by the legislatures of the states.[80]

A motion to select electors by the state legislatures was defeated on July 17 by a vote of 8 noes, 2 ayes.[81] On July 19 the convention reversed its position and adopted this method by a vote of 8 ayes and 2 noes.[82]

It was proposed that the electors should be chosen by the states in the ratio that would allow one elector to the smallest and three to the largest states.[83]

It was moved that electors be appointed in the following ratio: One for each state not exceeding 200,000 inhabitants, two for each above this number and not exceeding 300,000 and three for each state exceeding 300,000.[84] This motion was not acted on. Motion was made that electors be allotted to the states in the following ratio: One each for the states of New Hampshire, Rhode Island, Delaware and Georgia; two each to the States of Connecticut, New York, New Jersey, Maryland, North Carolina and South Carolina; three each to the States of Massachusetts, Pennsylvania and Virginia.[85] The motion was adopted—6 ayes, 4 noes.[86]

There was no vote on the motion that the number of electors be regulated by the number of representatives in the first branch.[87] It was moved that each elector vote for three candidates, two of which should be from some other state.[88] There was no vote on this motion.

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79 Formation of the Union, Op. cit. p. 137, Mr. Gerry—June 2.
80 Ib. p. 452, Mr. Butler—July 25.
81 Ib. p. 395, Mr. Martin.
82 Ib. p. 414, Mr. Ellsworth.
83 Ib. p. 412, Mr. Paterson—July 19.
84 Ib. p. 414, Mr. Ellsworth—Ib.
85 Ib. p. 416, Mr. Gerry—July 20.
86 Ib. p. 417, Mr. Gerry—Ib.
87 Ib. p. 417, Mr. Williamson—Ib.
88 Ib. p. 454, Mr. Williamson—July 25.

If Electors Fail to Elect, Selection to be Made

4. By Senate,

5. By House and Senate, or

6. By House.

The possibility that the electors would not complete their task was not overlooked. In the event of failure on the part of the electors to cast a majority for a candidate for president, it was proposed that the duty be performed by (1) the senate, (2) the house and senate, or by (3) the house. The senate was preferred because fewer could then say to the president: "You owe your appointment to us." Moreover, the president would not depend so much on the senate for his reappointment as on his general good conduct.[89] On the other hand if the election should be thrown into the senate the result would be that the same body of men would face the duty of impeaching the president in the event that duty arose.[90] The whole power of electing would be thrown into the senate.[91] Considering the powers of the president and those of the senate, if a coalition should be established between these two branches, they would be able to subvert the Constitution.[92] As the appointment was at the moment regulated (election by the senate) one member could not forbear expressing his opinion of its utter inadmissibility. He would prefer the government of Prussia to one which would put all power into the hands of seven or eight men, and fix an aristocracy worse than an absolute monarchy.[93] If election by electors was to be adopted, it would be preferable that they meet all together and decide finally without any reference to the senate.[94] It was thought preferable that the election be made in the house rather than in the senate, as the house would be often changed.[95]

It was noted that the power to nominate to offices would give great weight to the president, and that this would tend to perpetuate the president, so that the better remedy is

89 Ib. p. 665, Mr. Govr. Morris—Sept. 4.
90 Ib. p. 663, Mr. C. Pinkney—Sept. 4.
91 Ib. p. 668, Mr. Rutledge—Sept. 5.
92 Ib. p. 669, Mr. Mason—Sept. 5.
93 Ib. p. 672, Mr. Mason—Sept. 5.
94 Ib. p. 677, Mr. Spaight—Sept. 6.
95 Ib. p. 664, Mr. Wilson—Sept. 4.

the election of the president by the highest number of votes cast by the electors, whether a majority or not.[96]

It was then suggested that the eventual choice be made by the legislature voting by states and not per capita.[97] Then Mr. Sherman thought the house preferable to the whole legislature.[98] It would avoid the aristocratic influence of the senate.[99]

It was moved to strike out the word "if such number be a majority of that of the electors," thus making possible the choice of the executive by a minority of the votes of the electors.[100] The motion was negatived—2 ayes, 9 nos.[101] It was then moved to strike out the word "senate" and insert the word "legislature," which was negatived—3 ayes, 7 noes.[102]

It was moved that the electors meet at the seat of the general government, but all states voted no except North Carolina.[103] It was then moved that the election be on the same day throughout the United States, which was adopted—ayes 8, noes 3.[104] It was then moved that the eventual appointment be referred to the senate; and this was adopted by 7 ayes to 1 no.[105] And it was then moved that at least two-thirds of the senate be present at the choice of a president,[106] and this also was adopted—6 ayes, 4 noes.[107]

The provision that the senate should immediately choose in the event of the failure of any candidate to secure a majority was stricken and the "house" inserted in lieu thereof—10 ayes, 1 no.[108] And it was added that in case two candidates should receive an equal number of votes from the electors, the selection should be referred to the house—7 ayes and 3 noes.[109]

It was then moved that a quorum of the house for this

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96 Ib. pp. 675-6, Mr. Hamilton—Sept. 6.
97 Ib. p. 678, Mr. Williamson—Sept. 6.
98 Ib. p. 678—Sept. 6.
99 Ib. p. 678, Mr. Mason—Sept. 6.
100 Ib. p. 669, Mr. Mason—Sept. 5.
101 Ib. p. 670, Mr. Mason—Sept. 5.
102 Ib. p. 670, Mr. Wilson—Sept. 5.
103 Ib. p. 677, Mr. Spaight—Sept. 6.
104 Ib. p. 677—Sept. 6.
105 Ib. p. 677—Sept. 6.
106 Ib. p. 677—Sept. 6.
107 Ib. p. 678—Sept. 6.
108 Ib. p. 678, Mr. Sherman—Sept. 6.
109 Ib. p. 678, Mr. Madison—Sept. 6.

purpose should consist of a member or members from two-thirds of the states, which was agreed to,[110] the motion that the quorum should consist also of a majority of the whole number of the house of representatives being voted down—6 noes, 5 ayes.[111]

7. By the Second Branch of the Legislature

The suggestion that the second branch of the legislature, or the senate,[112] choose the executive, appears to have received no further discussion.[113]

8. By State Executives

The plan which the Founders had in mind generally was that the first branch (the house) [114] would be chosen by the people and the second branch (the senate) would be selected by the state legislatures. It was now proposed that the third branch (or executive) be named by state executives.[115] It was urged that the latter would be most likely to select the fittest man, and it would be to their interest to support the administration of the man of their choice.[116] The objections to this plan were the following: That the small states would lose all chance of an appointment from within themselves; that the executives of the states would be little conversant with characters not within their own small spheres; that they would generally be guided by the views of the state legislatures and would prefer either favorites within the states, or such as might be expected to be most partial to the interests of their respective states; that a national executive so named would not likely defend with becoming vigilance and firmness the national rights against state encroachments; and that the executives would not cherish the great Oak which would reduce them to paltry shrubs.[117]

One objection was insuperable,—that state executives, being standing bodies, could and would be courted and in-

110 Ib. pp. 678-9, Mr. King—Sept. 6.
111 Ib. p. 678, Mr. King—Sept. 6.
112 Ib. p. 116, Mr. Randolph—May 29.
113 Ib. p. 136, Mr. Rutledge—June 1.
114 Ib. p. 116.
115 Ib. p. 174, Mr. Gerry—June 7.
116 Ib. p. 179, Mr. Gerry—June 9.
117 Ib. pp. 179-80, Mr. Randolph—June 9.

trigued with by the candidates, by their partisans, and by the ministers of foreign powers.[118]

This proposal was defeated, 9 nees, 0 ayes.[119]

9. By State Executive With Advice of State Councils

A motion that the executive be appointed by the governors of the states, with advice of their councils, and where there were no councils, by electors chosen by the legislatures,[120] seems to have had no discussion or to have been voted upon.

10. By State Legislatures

It was moved by Mr. Gerry that the legislatures of the several states vote by ballots for the executive in the same proportions as had been proposed that they should choose electors, and in case a majority of the votes should not be given to one person, the first branch of the national legislature (the house) should choose two out of the four candidates having the most votes, and from these two, the second branch should choose the executive.[121]

This method was objectionable from many points of view. One was that the legislatures of the states had betrayed a strong propensity for a variety of pernicious measures; and one purpose of having a national legislature was to control this propensity, just as one purpose of having a national executive, insofar as he would have a power to negative laws, was to control any propensity of the national legislature in a similar direction. If the legislatures choose the executive this controlling purpose might be defeated. The legislatures can and will act with some kind of regular plan, and will promote the appointment of a man who will not oppose their favorite objectives. Should a majority of the legislatures at the time of election have the same objective or different objectives of the same kind, the national executive would be rendered subservient to them.[122] The motion was lost.[123]

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118 Ib. p. 451—July 25.

119 Ib. p. 180, Mr. Gerry—June 9.

120 Ib. p. 449, Mr. Gerry—July 25.

121 Ib. p. 443—July 24.

122 Ib. p. 450, Mr. Madison—July 25.

123 Ib. p. 443, Mr. Gerry—July 24.

11. By the States, Each of Which Would Vote for a Different Executive and from the Number Thus Selected either the National Legislature or Electors Appointed by the National Legislature Would Select the Executive

It was suggested that each state select an illustrious name, and out of these thirteen an executive magistrate might be chosen either by the national legislature or by electors appointed by it.[124] But there seems to have been no further discussion of this suggestion.

So much for the discussions in the Constitutional Convention, and their final decision on the method of selecting the chief executive. Now let us see how their solution of the problem was received in the state conventions.

The fear of the power of the executive crept into the debates in the state conventions. Some of the great in history expressed their views.

In Virginia, Patrick Henry thundered:

> . . . Shew me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty? . . .
>
> If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute? . . .[125]
>
> * * *
>
> . . . He [Mr. Randolph][126] told us, we had an American dictator in the year 1781. . . . We gave a dictatorial power to hands that used it gloriously; and which were tendered more glorious by surrendering it up. Where is there a breed of such dictators? Shall we find a set of American Presidents of such a breed? Will the American President come and lay prostrate at the feet of congress his laurels? I fear there are few men who can be trusted on that head. . . .[127]
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> . . . When the commons of England, in the manly language which became freemen, said to their king,

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124 Ib. p. 455, Mr. Dickinson—July 25.

125 Elliot's Debates in the State Conventions on the Adoption of the Federal Constitution, 1788, Vol. 3, p. 85.

126 Ib. p. 102.

127 Ib. pp. 170-1.

you are our servant, then the temple of liberty was complete. . . . What powerful check is there here to prevent the most extravagant and profligate squandering of the public money? What security have we in money matters? . . .[128]

* * *

. . . The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government. . . .[129]

* * *

I conjure you once more to remember the admonition of that sage man who told you that when you give power, you know not what you give. . . .[130]

And George Mason, the great protector of states' rights:

. . . as it now stands, he [the President] may continue in office for life; or in other words, it will be an elective monarchy.[131]

And James Monroe:

. . . Will not the influence of the president himself have great weight in his re-election? The variety of the offices at his disposal, will acquire him the favor and attachment of those who aspire, after them, and of the officers, and their friends. He will have some connexion with the members of the different branches of government. . . . I presume that when once he is elected, he may be elected forever. . . . Powerful men in different states will form a friendship with him. For these reasons, I conceive, the same president may always be continued, and be in fact elected by congress, instead of independent and intelligent electors. . . .[132]

So in Pennsylvania, James Wilson, in an extended report before the convention of that state, said:

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128 Ib. p. 175.
129 Ib. p. 369.
130 Ib. p. 404.
131 Ib. p. 445.
132 Ib. p. 221.

. . . The convention, sir, were perplexed with no part of this plan, so much as with the mode of choosing the President of the United States. . . .[133]

* * *

. . . Under this regulation, [selection of the President by electors], it will not be easy to corrupt the electors, and there will be little time or opportunity for tumult or intrigue. This, sir, will not be like the elections of a Polish diet, begun in noise and ending in bloodshed.[134]

But in Connecticut, Governor Huntingdon said in that convention:

. . . The history of man clearly shews, that it is dangerous to entrust the supreme power in the hands of one man. . . .[135]

* * *

This [the new government] is a new event in the history of mankind. Heretofore most governments have been formed by tyrants, and imposed on mankind by force. Never before did a people in time of peace and tranquility, meet together by their representatives, and with calm deliberation frame for themselves a system of government. . . .[136]

James Iredell, who with James Wilson was appointed by Washington on the first Supreme Court, said in the North Carolina Convention:

. . . The best writers, and all the most enlightened part of mankind, agree that it is essential to the preservation of liberty, that such distinction and separation of [governmental] powers should be made. But this distinction would have very little efficacy, if each power had no means to defend itself against the encroachment of the others.[137]

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133 Ib. p. 473.
134 Ib. p. 474.
135 Ib. p. 200.
136 Ib. p. 201.
137 Ib. Vol. 4, p. 95.

But James Lincoln in the South Carolina Convention was very critical:

> . . . The president holds his employment for four years, but he may hold it for fourteen times four years—in short, he may hold it so long that it will be impossible, without another revolution, to displace him. . . .[138]

Three conventions—Virginia, New York and North Carolina—recommended amendments to the Constitution:

Virginia:

> Thirteenth. That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.[139]

New York:

> That no Person shall be eligible to the Office of President of the United States a third time.[140]

North Carolina:

> XIV. That no person shall be capable of being president of the United States for more than eight years in any terms of sixteen years.[141]

Is Our Sun Setting?

From all the foregoing it is not difficult to see that the aim of the Founders was to make the three departments of the government independent of each other and to avoid the threat of monarchy. They desired to eliminate intrigue, the influence of foreign ministers, the perpetuation of the executive by Congress through the influence of tax-gatherers, fleets and armies. If Congress select the executive, ran the argument, he must not be eligible for succession. If electors select him their independence should be a sufficient assurance against usurpation or tyranny. To prevent any untoward influence being exercised upon them by any other branch of the government, the electors were

138 Ib. p. 300.
139 Formation of the Union, Op. cit. p. 1032.
140 Ib. p. 1042.
141 Ib. p. 1049.

safeguarded, and they were forbidden to be members of the House or Senate or to hold any positions of trust or profit under the United States. Only in the event of a failure of the electors to cast a majority was the election thrown into any branch of Congress, and the House, because it would be often changed, was finally decided on as the proper body to elect in this emergency.

The Founders wished to avoid a coalition between the Senate and any candidate since the power of selection would be in the hands of so few men. The electors were required to meet on the same day throughout the United States, which with the post and messengers as the only media of information, would prevent cabal and corruption. The votes would be by states, and a majority of states was necessary to a choice.

A choice by state executives was discarded because of the possible influence they would exercise in selecting a president, and lest they should cooperate with him in reducing the powers of the federal government,—"the great Oak which is to reduce them to paltry shrubs." Indeed, there would be a smaller number of executives to be intrigued with than senators if the senators were selected.

It was not wise to place the power in state legislatures, for they had already shown a strong propensity to a variety of pernicious measures; and it was feared that if the legislatures chose the president, he would be subservient to them and would not exercise his control over Congress if the Congress undertook the passage of like measures.

For a century and a half the solution of the Founders has produced no disastrous results. The government which they set up has been that of a free people. It remains now to be seen whether the rising sun painted behind Washington's chair, which Dr. Franklin said was difficult to distinguish from the setting sun, has indeed become a setting sun.[142] And a test will be put to the Doctor's prophetic sense when he was asked by Mrs. Powell in Philadelphia, "if we had a monarchy or a republic." He replied: "A republic, if you can keep it."[143]

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142 Formation of the Union, Op. Cit. p. 745.

143 Ib. p. 952.

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APPENDIX "D"

Alabama Law (Regular Session, 1951)

Act No. 557 H. 284—Givhan

AN ACT

To further amend Section 226 of Title 17 of the Code of Alabama of 1940.

Be It Enacted by the Legislature of Alabama:

Section 1. That Section 226 of Title 17 of the Code of Alabama of 1940 be, and the same hereby is, further amended to read as follows:

"Section 226. Electoral meeting and supply of vacancies,—The electors of president and vice-president are to assemble at the office of the secretary of state, at the seat of government at twelve o'clock noon on the second Tuesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president, and those of them present at that hour must at once proceed by ballot and plurality of votes to supply the places of those who fail to attend on that day and hour."

Section 2. That all laws or parts of laws, general, local or special, in conflict with the provisions of this act are hereby repealed.

Section 3. This act shall take effect immediately upon its passage and approval by the Governor, or its otherwise becoming a law.

Approved August 28, 1951.
Time: 5:31 P. M.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 30 day of August, 1951.

R. T. Goodwyn, Jr.,
Clerk of the House.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 649

BEN F. RAY, AS CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA,

Petitioner,

vs.

EDMUND BLAIR,

Respondent

MOTION TO RETAX COSTS

Now comes Edmund Blair, the respondent in the above styled cause and respectfully shows unto the court that costs have been taxed against the respondent as follows:

Clerk's costs	$299.52
Printing of record	644.99
Total	$944.51

Respondent further shows that there are approximately one hundred six (106) printed pages of the transcript of the record in this cause that should have been omitted from the printed record because matter not essential to a consideration of the questions presented by the petition for the writ

of certiorari are included therein, said matter appearing on pages 14 to 19, inclusive, beginning with the words "in the Circuit Court of Jefferson County" on page 14 and ending with the words, "filed in open court the 3rd day of February, 1952", on page 19, the matter included being a motion for continuance and a motion to quash summons; also a demurrer to petition as last amended beginning on page 21 of the record down to and including the words "filed in open court this 2nd day of February, 1952", on page 34 of the record; also the transcript of the evidence set out on pages 55 to 137 of the record where the words, "the foregoing was all the evidence in the case" appear on said page; also appellant's assignment of errors on pages 153, 154, 155, 156, 157 and 158 of the record.

Respondent avers that said unnecessary parts of the record were printed without affording him any effort whatsoever to stipulate to omit them from the printed record; that had he been afforded an opportunity to do so he would have stipulated that said printed matter might be omitted from the record because not essential to the consideration of the questions presented by the petition for certiorari.

Respondent avers that when he was served with a copy of the petition for certiorari the printing of the record was either under way or had been completed.

WHEREFORE, respondent moves the court to retax the costs of printing the record and retax the clerk's costs as provided for in paragraph 8 of Rule 38 of this Honorable Court.

HORACE C. WILKINSON,
Attorney for Edmund Blair.

STATE OF ALABAMA,
Jefferson County:

Personally appeared before me the undersigned authority in and for said county in said state Horace C. Wilkinson who being by me first duly sworn deposes and says that he is attorney for Edmund Blair and as such is authorized to make this affidavit and that the facts stated in the foregoing motion are true.

HORACE C. WILKINSON.

Sworn to and subscribed before me on this the 9th day of April, 1952.

MRS. JAUN[illegible]A KNOX,
Notary Public.

(1317)